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NOS. 8 AND 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHICAGO AND NORTH WESTERN RY. CO., *et al.*, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*.
No. 8

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,
v.
THE ATCHISON, TOPEKA AND SANTA FE RY. CO., *et al.*, *Appellees*.
No. 23

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES THE ATCHISON, TOPEKA AND SANTA FE RY. CO., ET AL. (MOUNTAIN-PACIFIC RAILROADS)

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QUESTIONS PRESENTED

The Interstate Commerce Commission issued orders which would shift tens of millions of dollars annually from railroads serving the far West to railroads serving the Midwest and East. Although very substantial increases in the

divisions of Eastern and Midwestern railroads were prescribed without any effort by the Commission to relate its orders to any findings of fact, the Commission did state that its orders were based upon a general concept of "revenue need," and all parties to the district court action for judicial review construed the Commission's orders as based upon revenue needs. In this Court, however, appellants attempt to defend the Commission's orders on the theory that they awarded Midwestern railroads "moderate increases" in their divisions based exclusively on "costs" and not at all on "revenue needs." In view of appellants' new position, the initial question presented is:

1. Whether the judgment of the district court should be reversed on the ground that that court erred in construing the Commission's action as prescribing increased divisions for Midwestern railroads in reliance upon general revenue needs and not solely upon costs of service, where appellants so construed the Commission's action before the district court and where there is no correlation between the Commission's orders and any cost findings.

The following questions are also presented:

2. Whether the district court properly set aside orders of the Commission for lack of adequate findings where the Commission, acting under a statute which requires consideration of "the amount of revenue required" by the several carriers, prescribed divisions for the express purpose of reflecting "revenue need," but without finding what the revenue needs were for any group of carriers and without finding what effect the prescribed divisions would have on the revenue needs of the carrier groups.

3. Whether Commission orders were properly set aside where such findings as were made on the subject of revenue needs discounted the needs of the Mountain-Pacific

railroads on the ground that statistical passenger deficits were responsible for these railroads' "revenue need problem," although the statistical passenger deficits do not represent moneys which could actually be saved even through discontinuance of passenger service, and where no hearing was held to determine whether any savings could be realized through reduction of the Mountain-Pacific railroads' passenger deficits.

4. Whether, in addition to findings with respect to carrier groups, the Commission was required to find that its orders would operate fairly upon individual carriers and to make findings justifying the effect of its orders upon the three (not 300 but 3) carriers whose revenues would be disproportionately affected by the unique impact of the prescribed divisions upon them.[1]

5. Whether this Court should, contrary to its usual practice, resolve in the first instance substantial questions as to the lawfulness of the Commission's cost determinations which were not reached by the district court.

6. Whether the district court erred in declining to speculate on questions of equity jurisdiction which the Midwestern railroads might raise in the event of a further order of the Commission on remand.

STATEMENT

This case is an action for judicial review of reports and orders of the Interstate Commerce Commission which prescribed the division of revenues collected under joint rates maintained by the many railroads operating in the East

[1] The individual railroad question is the only question presented by the United States and the Commission, appellants in No. 23 (U.S. Brief, pp. 2-3).

and Midwest and the relatively few railroads serving Mountain-Pacific territory.

1. The Proceedings Before the Commission.

Most of the evidence submitted in the proceedings before the Commission related to the issues of relative costs of service and relative revenue needs, two of the factors to which the Commission must give due consideration under Section 15(6) of the Interstate Commerce Act (49 U.S.C. § 15(6)).

On the issue of relative costs of service, the Eastern and Midwestern railroads relied upon a comparison of the territorial average costs of handling all traffic in the three territories. The Mountain-Pacific railroads, on the other hand, undertook a study designed to determine the actual costs incurred by the three groups of railroads in handling transcontinental traffic, which was described by the Commission's Examiners as being a more complete cost study "in scope and detail [than] had ever before been presented in a proceeding before the Commission" (R. 715). This study of the relative costs of service of the three groups of railroads on transcontinental traffic showed that the Mountain-Pacific railroads' proportion of the costs of handling transcontinental traffic was substantially equal to their percentage of the revenues from that traffic, that the Midwestern railroads were receiving a percentage of revenues somewhat in excess of their costs and that the Eastern railroads were receiving somewhat less revenues than their percentage of costs (R. 713).

On the issue of relative revenue needs, the Eastern and Midwestern railroads placed their principal reliance on overall group average rates of return. The Mountain-Pacific railroads, on the other hand, presented a detailed analysis of the actual revenue needs of the three groups

of railroads based upon actual dollar expenditures of the railroads during the most recent 5-year, 8-year and 10-year periods for which data were available (R. 140-145). The conclusion of the study was that the Mountain-Pacific railroads had substantially greater revenue needs than either of the other two groups (R. 76-77, 290-295).

In their recommended report, the Commission's Examiners substantially bypassed the evidence of record. The Examiners simply refused to determine the cost issues which had been raised with respect to the Mountain-Pacific railroads' study (R. 715-716, 723).

The Examiners discussed the revenue needs issue at some length (R. 725-747), but again they gave no effect to the evidence of record. Instead, they decided that the revenue needs of the Eastern and Midwestern railroads were greater than those of the Mountain-Pacific railroads on the ground that the evidence relied upon by the Mountain-Pacific railroads should be discounted because of data with respect to passenger deficits that had not been relied upon by any party (R. 737-742). On the basis of such data, the Examiners held that the actual revenue needs showing of the Mountain-Pacific railroads in this divisions case must be discounted because their revenue needs problems should be solved by a reduction of excessive passenger deficits (R. 743-744).

The Examiners thereupon recommended increases in the divisions of both the Eastern and Midwestern railroads without further explaining the basis of their action or in any way relating the divisions recommended to the standards of Section 15(6). Although these increases were necessarily based upon the Examiners' views with respect to the revenue needs of the carriers, the cost issues not having been resolved, no finding was made as to the financial effect

of the recommended increases upon any railroad or group of railroads.

The Mountain-Pacific railroads took exceptions to this recommended report, including specific exceptions to the Examiners' failure to resolve the cost issues and determine the relative costs of service and to their failure to determine the revenue needs issue on the basis of the evidence of record (R. 793-820). The Mountain-Pacific railroads also offered to prove that the Examiners' belief that their revenue needs could be met by a reduction in their passenger deficits was erroneous because, among other things, a discontinuance of passenger service would serve only to shift non-avoidable common costs to freight service so that the true effect of a discontinuance of passenger service would be a worsening of their overall financial position (R. 795-807, 824-840). But no hearing was ever afforded to take such evidence.

The Commission's report substantially adopted the approach, and to a great extent the *verbatim* language, used by the Examiners (e.g., compare R. 725-747 with R. 1015-1029).

Although the Commission discussed "cost of service" and set forth a "Restatement" of cost figures, the Commission did not even purport to determine the relative costs of service of the various groups of railroads on transcontinental traffic. Instead, it contented itself with criticism of some of the aspects of the Mountain-Pacific railroads' study and rejected other aspects of that study because they "were not or could not be uniformly applied to each territory" (R. 997). In the Commission's view, this cursory treatment of the cost issues was sufficient to convince it that the existing divisions were not supported by the cost evidence and nothing more was considered necessary because it did

not intend to prescribe divisions on the basis of costs (R. 1032):

> "From our consideration of the cost evidence previously discussed in this report we are convinced that the present divisions are favorable to the defendants to an extent not justified by ascertainable cost differences. The evidence, however, does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need."

When the Commission turned to the revenue needs issue to which it had decided to give primary importance in its decision, it embraced the passenger deficit theory injected into the case by its Examiners. The Mountain-Pacific railroads' showing of their actual revenue needs was flatly rejected on that theory (R. 1026):

> "The comparisons of freight net railway operating income and passenger deficits also have a bearing on the assertion of the defendants that 'the increased investment required in serving the growing mountain-Pacific territory has produced no return for the owners of the mountain-Pacific roads.' This alleged deprivation results from passenger deficits of those roads, as will now be explained."

And the Commission stated its general conclusions with respect to the revenue needs issue in terms of "freight income" as contrasted with overall railroad income, thus discounting the revenue needs of the Mountain-Pacific railroads because of their passenger deficits (R. 1029).

The divisions prescribed by the Commission in its report and order differed from those recommended by the Examiners in that the divisions recommended for the Midwestern railroads were in the form of percentages (R. 763-789), whereas those prescribed by the Commission were in the

form of a series of scales of so-called "Divisional Factors" used to calculate percentages (R. 1101-1102).

In Appendix C to their brief in this Court, the Midwestern railroad appellants present two "examples of the application and operation of these divisional scales" (C&NW Brief, p. 25). Both examples relate to the Midwestern haul between Chicago and the Missouri River (Council Bluffs) in which the Midwestern appellants are primarily concerned. One example shows that, for a shipment originated in Chicago destined to San Francisco, the present Midwestern division of 16.5% would be increased to 22% (C&NW Brief, p. 2c), up 5.5 percentage points, which would produce a 33% increase in the present division. Appendix A attached hereto sets forth the application of the prescribed scales to other examples of Midwest-transcontinental traffic and shows that the revenues of the Midwestern railroads would be increased by percentages ranging as high as 146%.

The second example presented by the Midwestern appellants shows that for the Chicago-Council Bluffs intermediate (bridge) haul on a shipment from New York to San Francisco, the present Midwestern division of 16.5% of the western revenue would be increased to 19% (C&NW Brief, p. 3c), up 2.5 percentage points, which would produce a 15% increase in the present division of appellants. Appendix B attached hereto sets forth the application of the prescribed scales to other examples of Midwestern bridge hauls on Official-transcontinental traffic and shows that the present divisions of the Midwestern railroads would be increased by varying percentages ranging as high as 98%.

The Commission made no effort to show how its ultimate order and the divisions it prescribed related to any of the standards of Section 15(6). Nor was any finding made as to the revenue effect of its order.

In a petition for reconsideration, the Mountain-Pacific railroads again objected to the failure of the Commission to make findings on the issues before it and to its refusal to give effect to the evidence of record. Specific objection was made to the Commission's cursory treatment of the cost of service issues, the Mountain-Pacific railroads pointing out the unlawfulness of the Commission's action in simply criticizing their cost study and ignoring that study whenever comparable evidence was not available for the other two groups of railroads (R. 1059). In its supplemental report, the Commission rejected this contention, holding first that it had doubt as to whether it had power to require the Eastern and Midwestern railroads to produce relevant evidence in their possession (R. 1059), and then stating that its consideration of the cost issues had been adequate for the limited purpose for which costs were used (R. 1066).

The Mountain-Pacific railroads also objected to the Commission's ultimate order fixing divisions as between Midwestern and Mountain-Pacific divisions on the ground that it was not "constructed or justified by cost," even the costs as "restated" by the Commission. The Commission rejected this objection, stating (R. 1078): "This contention incorrectly assumes that the construction of a divisional scale is primarily a matter of costs and mathematics."

In discussing the stated ground of its decision, the relative revenue needs of the carriers, the Commission expressly rejected the contention that it had any obligation to make findings with respect to the actual needs of the carriers or the financial effect of its order as a prerequisite to prescribing divisions based upon revenue needs (R. 1068-1069). The Commission again reaffirmed its reliance upon statistical passenger deficits as "responsible" for the "revenue need problem" of the Mountain-Pacific railroads (R. 1072).

On this basis, the Commission issued a supplemental order denying petitions for reconsideration and prescribing divisions substantially identical to those prescribed in its earlier order (R. 1093-1111).

2. The Proceedings Before the District Court.

The complaints filed in the district court attacked both the Commission's original order and its order denying reconsideration. The initial issue raised by the complaints related to the refusal of the Commission to state in any intelligible way the standard upon which it was acting in prescribing new divisions or to make findings to support the divisions prescribed in terms of such standard. The position of the plaintiffs before the district court was summarized as follows (R. 1511):

> "It is the statutory duty of the reviewing Court to set aside administrative decisions which do not contain a statement of the findings and conclusions of the agency, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record, 5 U.S.C. § 1007(b), or where findings made by the agency are not supported by substantial evidence, 5 U.S.C. § 1009 (e). *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168 (1962). The complexity and difficulty of an issue does not justify relaxation of the requirement of reasoned findings, but makes it the more imperative that such findings be made. *Mississippi River Fuel Corp* v. *F.P.C.*, 163 F.2d 433, 439 (D.C. Cir. 1947)."

The Midwestern railroads took the position that the Commission need not state the basis of its orders (R. 1688):

> "I close by calling attention to one passage in the B & O case in the 298 US where the Supreme Court, after stating there is no requirement that the Commission specify the weight given to any item of evidence

or fact, or disclose mental operations by which its decisions are reached, further added:

"'* * * useful precision in respect of either would be impossible.'

"Now, our friends say that language is no longer the law. It was written before the Administrative Procedure Act. But I respectfully submit that the court should not ascribe to Congress an intention in enacting the Administrative Procedure Act to lay down standards in respect of findings which the Supreme Court had previously said were impossible of fulfillment. You can't specify the weight given to these intangible and judgment factors."

In its opinion, the district court rejected appellants' basic contention that the Administrative Procedure Act did not require findings on all material issues in a divisions case (R. 1722):

"There is no question but that whether the new divisions are just, reasonable and equitable is for the Commission, not for the Court. But it is equally clear that, in prescribing the divisions, the minimum duty of the Commission is to give due consideration to each of the five factors the Congress has listed in Section 15(6). Furthermore, although the Commission has broad discretion in the matters involved, such discretion can never serve as a substitute for the 'findings and conclusions, as well as the reasons or basis therefor', required by Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 1007(b)], or for the clarity of findings required by that Act."

The lower court then went on to point out several areas in which the Commission's treatment of the issue of relative revenue needs did not satisfy the requirements of Section 8(b), including its failure to find the revenue needs of the carriers in any meaningful form (R. 1724-1725), its failure to find the effect of its orders (R. 1725), and its failure to

find that its orders would operate fairly in their impact upon individual carriers (R. 1725-1731). The district court also held that the Commission was required to consider "the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits" (R. 1733).

The complaints before the district court also challenged the Commission's treatment of costs of service as unsupported by substantial evidence relating to the transcontinental traffic at issue (in contrast to the average costs of all traffic), as otherwise violating the Administrative Procedure Act, and on other legal grounds (Issues Nos. 20-29; R. 1338-1345, 1507-1510, 1519-1522). Since the Commission did not base its orders upon costs, and since the district court held that the Commission's orders were not supported by adequate findings respecting revenue needs, the court did not reach the issues challenging the Commission's treatment of costs (R. 1733).

3. The Settlements with All Eastern and Many Midwestern Roads.

The Commission's orders in the present case, as entered and as reviewed by the district court, covered the divisions of transcontinental revenue as between the Mountain-Pacific railroads and substantially all Eastern and Midwestern railroads. Thereafter, settlement agreements were made which rendered the case moot as to all Eastern railroads and as to Midwestern railroads handling approximately two-thirds of the Midwestern participation in transcontinental traffic.[2]

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[2] Contrary to appellants' unsupported assertion that the settling Midwestern lines are "subsidiaries or associates of the Mountain-Pacific lines" (U.S. Brief, p. 20; C&NW Brief, p. 11), only 5 of the settling Midwestern railroads are affiliated with the Mountain-Pacific railroads, one is under contract to merge with a Mountain-Pacific railroad, and 12 are independent railroads.

The Commission vacated its orders insofar as they affected the settling carriers, and this Court ordered that the settled portions of the cases be dismissed as moot (383 U.S. 832, 384 U.S. 888).

The remaining eight appellants in No. 8 are the non-settling Midwestern railroads. They operate primarily in that portion of the Midwest between Chicago-St. Louis, on the one hand, and Kansas City-Council Bluffs-Twin Cities, on the other.

SUMMARY OF ARGUMENT

I. Appellants rest their argument in this Court upon the premise that the Commission prescribed increased Midwestern divisions solely because of costs of service, and not because of the carriers' revenue needs. That premise is false. The Commission's reports state its conclusion that costs of service did "not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need" (R. 1032). Accepting an argument of the appellant Midwestern railroads, the Commission expressly ruled that the Midwestern divisions prescribed in the orders under review were not "primarily a matter of costs" (R. 1078-1079).

As defendants in the district court, appellants took the position that the Commission had prescribed Midwestern divisions in the exercise of judgment and discretion respecting revenue needs. By reversing that position to argue that the court below erred in failing to find that costs were the sole basis of the prescribed increases in Midwestern divisions, appellants not only misconstrue the Commission's reports but violate the principle that a party is bound in this Court by the theory of the case he espoused in the court below. In any event, if the Commission's reports are so obscure as to permit appellants to interpret them one

way in the court below and the opposite way in this Court, the Commission's orders should be set aside for lack of a "basis . . . set forth with such clarity as to be understandable." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

Even on the false premise that costs were the sole reason given for increasing the Midwestern divisions, the Commission's orders cannot be sustained. Appellants concede that the Commission's general reliance on expertise and discretion cannot satisfy its duty to "articulate [a] rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168 (1962). But appellants fail to show the necessary rational connection.

Appellants' entire argument is a play on the words "moderate increases." They claim a connection between Commission orders said to produce "moderate increases" and Commission cost determinations which would support "moderate increases." But the divisions actually prescribed by the Commission's orders cannot be covered by the description "moderate increases," for they vary widely and range as high as 146 percent. And appellants make no effort to relate the divisions prescribed to any of the Commission's cost determinations. The divisions actually prescribed far exceed any increases indicated by such cost findings as were made by the Commission.

This is a case in which the orders of the Commission were deliberately not constructed from costs, and the divisions which these orders produce are therefore not related to costs. The resulting divisions produce widely varying results, increasing divisions substantially for some Midwestern railroads but not for others. The eight Midwestern railroad appellants are the winners in this lottery, receiving increased divisions which they themselves described before

the Commission as "substantial." Nothing in the Commission's reports supports any such increases.

Unable to support the Commission's orders with any rational justification from the Commission's reports, appellants attempt to propel this Court into the administrative domain by asking it to accept assertions with respect to cost and traffic data not taken from findings of the Commission and outside any record.

Finally, appellants ask this Court to accept the notion that railroad divisions are so complex that it is "impossible" for the Commission to support its orders with rational findings and that it was "necessary" for the Commission to resort to Delphic reliance upon "expertise" and "discretion." But such assertions offer no substitute for findings articulating a rational support for Commission orders as required by law. And any argument that compliance with the Administrative Procedure Act is "impossible" in railroad divisions cases is no longer tenable because the Commission itself has subsequently repudiated that view and has demonstrated its ability to prescribe divisions rationally related to its findings of fact. *Official-Southern Divisions,* 325 I.C.C. 1 (1965).

II. Appellants deny that revenue needs had anything to do with the Commission's decision to increase Midwestern divisions. If they are correct, the Commission orders under review lack any basis, because the Commission's cost determinations do not support them.

In fact, the Commission stated it was prescribing increased Midwestern divisions to "reflect certain broader aspects of revenue need" (R. 1032). Revenue needs were a material issue in its proceedings, and the district court was correct in setting aside the Commission's orders for lack of adequate findings respecting revenue needs.

This Court's opinion in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168 (1962), makes it clear that the Commission may not exercise "unbounded discretion." There must be findings, analysis, and a basis for administrative action. This Court's opinions in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, 309-310 (1958), and *Florida* v. *United States*, 282 U.S. 194, 214-215 (1931), establish the findings necessary to rational exercise of discretion respecting revenue needs. In order to determine the contribution that any part of the carriers' traffic ought to make to their overall revenue needs, it is necessary to find both the amount of the revenue needs and the effect that a Commission order would have upon those needs.

Yet, in the proceedings under review, the Commission expressly refused to find either the amount of revenue needed by any group of railroads or the financial effect of its orders (R. 1066-1070). In the absence of such findings, the Commission's orders constitute an effort to change railroad revenues by unstated and undetermined amounts for the purpose of meeting unstated and undetermined revenue needs. This turns the making of divisions into an administrative game of blindman's buff.

There is no basis to appellants' claim that the district court forbade the Commission to consider rates of return. Whatever evidence the Commission may consider, findings of rates of return do not suffice to support Commission action based on revenue needs because rates of return do not even purport to measure the amounts of revenue actually required by the railroads. Moreover, the Commission made no finding, in terms of rates of return or otherwise, of the effect of the prescribed divisions on the railroads' revenue needs.

The Commission declared that such findings were not required, and it did not purport to make them in terms of any

standard. In short, the Commission insisted on exercising "unbounded discretion"—exactly what this Court has held it may not do. The district court correctly set aside the Commission's orders for lack of the findings on material issues required by the Administrative Procedure Act.

III. The Commission's erroneous reliance on passenger deficits in disposing of revenue needs issues constitutes an independent ground for setting aside its orders. In the Commission proceedings, the Mountain-Pacific railroads (appellees in this Court) introduced detailed evidence of specific revenue needs arising from the unique and growing service requirements of Mountain-Pacific territory. The Commission rejected this evidence, not on the ground that it was inaccurate or unreliable, but on the ground that the Mountain-Pacific railroads' "alleged deprivation [of earnings and revenue] results from passenger deficits of those roads" (R. 1026). The Commission acknowledged that the Mountain-Pacific railroads did have a "revenue need problem" but held that passenger deficits were "responsible" (R. 1072).

The Commission made no finding that would justify giving controlling significance to passenger deficits. It did not find that appellees could reduce their passenger deficits and thereby secure needed funds. The Government's statement in this Court that passenger deficits are "*presumably* not permanent in nature" is not a finding; it merely emphasizes the lack of any finding (U.S. Brief, p. 16, note 10) (emphasis supplied). The Commission did not find that the Mountain-Pacific railroads' passenger deficits were transitory, and there is no evidence to support such a finding if it had been made.

Indeed, the matter of passenger deficits was never the subject of hearings by the Commission. The Commission's Examiners, without any basis in the record, introduced the

passenger deficit theory in their recommended report. Thereafter, the Commission unlawfully denied appellees' request for a hearing, at which appellees offered to prove that although their passenger service is statistically a deficit operation, it produces revenues in excess of out-of-pocket costs, so that discontinuing it (if public authorities permitted) would reduce—not increase—their net income. Such reliance upon statistical passenger deficits as the basis for disallowing the critical revenue needs of the Mountain-Pacific railroads, without support in any evidence and without according a hearing on an issue never raised by any party, was arbitrary and unlawful. *ICC* v. *New York, New Haven & H. R. Co.*, 372 U.S. 744, 763-764 (1963).

IV. The district court correctly held that, in addition to its failure to make necessary findings with respect to railroad groups, the Commission also failed to find that the prescribed divisions would be fair to individual carriers. Section 15(6) by its terms requires that divisions be determined upon consideration of the situations of individual carriers. This Court's decisions in the *New England Divisions Case*, 261 U.S. 184 (1923), and *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924), make it clear that the Commission has power to prescribe divisions on a group basis only where its determinations rest upon evidence which is *typical* of the situations of the individual carriers embraced in each group. In this case, the Commission made no finding that the evidence before it, pertaining to groups, was typical of the situations of individual railroads, so that the prescribed divisions would be fair "in respect to each division of each rate of every carrier," as is required by *New England Divisions, supra*, 261 U.S. at 196-197. For lack of such findings, its orders were correctly set aside.

Furthermore, it was affirmatively shown before the Commission that the divisions it prescribed would have a

ruinous financial effect on the Denver & Rio Grande Western. Even though confronted with a specific claim that the carrier's situation was not typified by evidence pertaining to the Mountain-Pacific group, the Commission erroneously gave the issue no consideration. It neither modified its orders to avoid disproportionately severe treatment of the Rio Grande nor made findings that would justify a decision to ruin that railroad. The Rio Grande did not, by presenting evidence as a member of the Mountain-Pacific group of railroads, waive its right to complain of orders which would injure it to a far greater extent than any other member of that group.

There is no substance in appellants' claim that the holding of the court below would frustrate the Commission's administration of Section 15(6). The court below did not require separate findings for each railroad, but held only that the Commission must find prescribed divisions to be fair to individual carriers, as required by this Court's decisions in the *New England Divisions* and *Abilene & Southern* cases. Effective administration is not impaired by requirements that the Commission find on the basis of typical evidence that the prescribed divisions are fair with respect to individual railroads, and that it give consideration to the individual situations of carriers—3 of 300 in this case—which claim to be disproportionately affected by orders applicable to groups.

V. In the district court, a number of issues of law related to the Commission's determinations respecting costs of service, including issues which all parties stipulated were substantial. The district court did not reach these issues, finding it "unnecessary to discuss" them in view of its conclusion that the Commission had erred in its treatment of revenue needs (R. 1733). These cost issues are not before this Court, under its "practice . . . not to review an admin-

istrative record in the first instance . . ." *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 577-578 (1952); *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 157 (1965).

The Midwestern appellants recognize this practice and confine their appeal to the questions reached by the district court (C&NW Brief, p. 50, note 39). The Government, however, urges that this Court "resolve the entire controversy" (U.S. Brief, p. 62). But it is apparently not the Government's view that this Court should decide the issues reserved by the court below, for the Government has neither briefed these issues nor caused the portions of the record bearing on them to be printed. The Government seems to suggest that this Court simply brush aside these substantial issues and uphold the Commission's orders without regard to errors of law it may have committed in its cost determinations. The Government would thus have this Court deny appellees their right of judicial review of the very cost determinations which the Government claims to be the sole basis of the Commission's orders. This would be manifestly improper and unfair.

VI. The Midwestern appellants contend that the district court ought to have retained jurisdiction "to require equitable resettlement of the divisions involved" on the speculation that the Commission might, on remand, make "additional findings" and reaffirm its "original determination" (C&NW Brief, pp. 42, 111). If speculation were proper, it would be more reasonable to assume that the Commission would not again enter the orders under review and, upon evaluation of the evidence respecting revenue needs and costs in conformity with proper standards, would enter an order reducing the present divisions of Midwestern railroads. But speculation was premature in the district court and it is premature in this Court. The court

below properly followed the rulings of this Court in refusing to speculate about equitable jurisdiction and remedies. *Lehigh Valley Cooperative* v. *United States*, 370 U.S. 76, 99 (1962).

ARGUMENT

I. THE COMMISSION'S ORDERS CANNOT BE DEFENDED AS BASED UPON COSTS WHERE ALL PARTIES RECOGNIZED IN THE DISTRICT COURT THAT THE COMMISSION'S REPORTS SHOW THE CONTRARY AND WHERE THERE IS NO CONNECTION BETWEEN THE COMMISSION'S ORDERS AND ANY COST FINDINGS.

Appellants defended the Commission's orders in the court below on the theory that prescription of divisions is so much a matter of "intangible and judgment factors" that the Commission needed neither to state any standard nor make findings relating the prescribed divisions to such a standard (*supra*, pp. 10-11). They contended that the Commission had "found that the divisions prescribed [for Midwestern territory] 'must reflect certain broader aspects of revenue need' " and had constructed a divisional scale by exercise if its "practical judgment" (R. 1404).

In this Court, however, appellants want no part of the theory they espoused below. They now claim that all of the vagueness and reliance on discretion found in the Commission's reports—including the Commission's insistence upon prescribing divisions to reflect revenue needs without finding either the extent of those needs or the financial effect of its orders — applied only to the divisions prescribed for the Eastern railroads which, having settled, are no longer parties to the case (U.S. Brief, pp. 11-12; C&NW Brief, p. 47). Appellants assert that the prescribed increases in Midwestern divisions rest entirely upon costs of service, and in that nar-

row context, are supported by substantial evidence and adequate findings.

Appellants' new theory of the case is contrived and fundamentally unsound. Their argument that the Commission made costs of service the governing consideration in prescribing Midwestern divisions reverses the position they took in the court below, ignores the declarations of the Commission that its orders were not based upon costs, and imputes non-existent clarity and rationality to the Commission's reports. Furthermore, even on appellants' theory of the case, there is no connection between the orders actually entered by the Commission and any findings as to the costs which appellants claim to be the basis of the Commission's action.

A. Appellants' Argument That The District Court Erred in Treating the Commisson's Orders As Based Upon Revenue Needs Is Inconsistent With The Position They Took In That Court, Is Incorrect, And Shows At Most That The Commission's Action Should Be Set Aside For Lack of Clarity.

The Midwestern appellants argue in this Court that (C&NW Brief, p. 31):

> "The Commission based its decision to order moderate increases in the divisions of the Midwestern lines on the relative cost of service and not on the more general revenue needs of those carriers."

The Commission, so Midwestern appellants say, "made it plain that the increases it was ordering in the Midwestern divisions on the traffic involved were based on relative cost of service and not on revenue needs" (C&NW Brief, p. 22). The claim is many times reiterated (C&NW Brief, pp. 31, 34, 39, 40, 45, 46, 47, 48, 49, 50, 51, 52, 64, 65, 67, 68, 89, 92, 93, 99, 101, 105, 111).

The Government joins this position: "Considerations relating to relative costs of service and not revenue needs thus governed with regard to the prescribed increases of Midwestern, as distinguished from Eastern, divisions" (U.S. Brief, pp. 11-12; see also pp. 47, 52, 53).

Both the Government and the Midwestern appellants attack the judgment of the court below on the ground that that court failed to grasp the controlling significance of costs of service in the Commission's decision respecting Midwestern divisions. According to the Government, the district court "ignored" Commission cost findings and passed them by to hold that findings on revenue needs were inadequate (U.S. Brief, pp. 47-48). According to Midwestern appellants, "The fact that the Commission decided to increase the divisions of the Midwestern lines on the basis of relative costs . . . destroys the premise of the holding below . . ." (C&NW Brief, p. 31).

Appellants' whole argument rests on a false premise. Although much of the Commission's action is obscured by a dense fog of administrative verbiage, the Commission at least made it plain that it did not base its action exclusively upon costs of service. The Commission expressly held that the divisions prescribed for Midwestern railroads were not "constructed or justified by cost" (R. 1078). And the Commission's "conclusions" (R. 1029) with respect to the evidence covering "the three principal groups" (Eastern, Midwestern and Mountain-Pacific railroads) stated that the "cost evidence . . . does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue need" (R. 1032).

Appellant Midwestern railroads now say: "This statement read in context is plainly directed to the Commission's reasons for increasing the divisions of the Eastern lines"

and not the Midwestern divisions (C&NW Brief, p. 47). But this construction of the Commission's reports is not only wholly wrong,[3] but was not even devised until the filing of briefs in this Court. For in the district court, appellants themselves construed the Commission's statements rejecting costs and providing that the divisions prescribed "reflect certain broader aspects of revenue need" as directed to the divisions "prescribed for application in Midwestern and Mountain-Pacific Territories," and they specifically asked the district court to uphold the Commission's orders on that ground (R. 1404).[4] Indeed, the proceedings before the district court are replete with appellants' statements that the divisions prescribed for Midwestern railroads were based in substantial part upon revenue needs.

Appellants asked the district court to find that the divisions prescribed for the Midwestern railroads (in the form

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[3] As Midwestern appellants concede: "This statement was made in the introductory passage of the Commission's discussion of 'Required revenue' in its initial report and, as the context shows, was directed to the entire controversy then before the Commission" (C&NW Brief, pp. 47-48, note 36). This "entire controversy" included the Midwestern as well as the Eastern divisions.

Midwestern appellants attempt to "contrast" their divisions with the Eastern divisions on the ground that the Commission used the phrase "cost and revenue needs" in describing its basis for increasing the Eastern divisions (C&NW Brief, p. 23). This does not serve to differentiate the Midwestern situation since the Commission also used the term "cost of service and revenue needs" to describe its prescription of divisions between Midwestern and Mountain-Pacific railroads (R. 1079).

[4] This construction of the Commission's report was set forth in Paragraph 48 (R. 1404) of the "Findings of Fact, Conclusions of Law, and Judgment Proposed by Defendants and Intervening Defendants" (R. 1349), and signed by counsel for Midwestern railroads, counsel for the United States, and counsel for the Commission (R. 1490-1491).

of so-called divisional scales) give recognition to the evidence as to "revenue needs" (R. 1467-1468). Appellants took the same position at oral argument. Judge Crary put to an attorney for the Midwestern lines the question whether, assuming that the cost results were proper (R. 1663):

> ". . . your divisions, the divisions of the ICC are valid and just divisions and it doesn't make any difference what the financial effect of the divisions may be.
>
> "Is that in substance your position?"

The reply (*ibid.*):

> "Mr. Belnap: Not quite, sir. The cost aspect of a division case is a separate concept from the revenue needs . . . of the carriers."

The attorney for the United States and the Commission, concluding the argument for defendants below, also told the district court that the Commission relied upon revenue needs as supporting its action with respect to the Midwestern divisions (R. 1692-1693).[5]

The district court set aside the Commission's orders for insufficiency of the Commission's findings and conclusions with respect to revenue needs (R. 1733). The district court made no distinction between the divisions prescribed for the Midwest and those prescribed for the East, as to which appellants concede the Commission relied on revenue needs (U.S. Brief, p. 11; C&NW Brief, p. 23).

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[5] In the district court, all appellants, including the Midwestern railroads who now seek to raise in this Court the question whether any of the Commission's errors were prejudicial to appellees (C&NW Brief, p. 4), conceded that, if the Commission were held to have erred with respect to its treatment of revenue needs (Issues 1-4, 14, 15, 17-19; R. 1326-1338), such errors were "prejudicial" and were not "*de minimis*" (Issue 30; R. 1345).

And the Midwestern railroads specifically told the court that no such distinction could be made (Memorandum of Points and Authorities on behalf of Chicago and North Western Ry. Co., et al., in Opposition to Interlocutory Injunction, p. 31):

> "The questions bearing upon the validity of the Commission's order as applied to Midwest-Transcontinental traffic, and as applied to the subdivisions between the plaintiffs and the intervening Midwestern defendants of divisions west of Chicago, St. Louis and other western termini of the Eastern lines, are identical with the questions presented with respect to the validity of the Commission's order as applied to the divisions of the Eastern railroads."

Appellants' own recognition in the district court that the Commission did not ground its orders increasing Midwestern divisions upon findings with respect to costs of service demonstrates that those orders cannot now be sustained by reliance on costs. Moreover, appellants specifically asked the district court to uphold their divisions on the basis of the Commission's discretion with respect to revenue needs. Their contention here that the judgment of the district court should be reversed because that court failed to find that the Commission's orders prescribing divisions for the Midwestern appellants were based exclusively on costs not only erroneously construes the Commission's action, but also violates the established principle that a party is bound in this Court by the theory of the case espoused in the court below. *Baltimore & P. R. Co.* v. *Mackey*, 157 U.S. 72, 87-88 (1895).[6]

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[6] As late as the filing of the jurisdictional statements upon which this Court acted in noting probable jurisdiction, both the Government and the Midwestern appellants presented this case as one in which the Commission had prescribed increases in Midwestern divisions in reliance upon revenue needs (U.S. J.S., p. 7; C&NW J.S., p. 9).

Accordingly, if anything is plain in this case, it is that the Commission's orders prescribing divisions as between Midwestern and Mountain-Pacific railroads are not based exclusively upon costs, and appellants' arguments to the contrary must be rejected. Indeed, to the extent that appellants succeed in showing that there is any doubt as to the basis of the Commission's orders, they only further undercut those orders. For if the Commission's reports permit an interpretation differing as drastically from the interpretation of the judges and all parties in the court below as does appellants' argument in this Court, the Commission has not satisfied the requirements of clarity that this Court laid down in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947):

> "If the administrative action is to be tested by the basis upon which it purports to rest that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511."

This rule has been regularly applied to the Interstate Commerce Commission. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654 (1954); *Railway Labor Executives Assn.* v. *United States*, 379 U.S. 199, 200 (1964). If the Commission's reports are such that appellants can read them one way in the court below and the opposite way in this Court, the most charitable thing that can be said of those reports is that they are obscure. For this reason alone, the Commission's order should be set aside under *Chenery* for lack of a "basis . . . set forth with such clarity as to be understandable."

B. There Is No Rational Connection Between The Ultimate Orders Of The Commission And Any Cost Findings.

As we have shown, appellants' argument in this Court rests upon the false premise that the Commission based its decision to increase Midwestern divisions solely on costs. Even on that false premise, moreover, appellants are unable to support the orders actually entered by the Commission.

The Administrative Procedure Act requires that the Commission state "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" (Section 8(b), 5 U.S.C. § 557(c)).[7] This Court has emphasized that general reliance upon "discretion" and "expertise" does not satisfy the requirements of law, and that the Commission itself must "articulate [a] rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167-168 (1962). See also *Baltimore & O. R. Co.* v. *United States,* — U.S. — (35 Law Week 4271, 4276, decided March 27, 1967).

The requisite rational connection between Commission cost findings (even assuming it actually made definitive cost findings) and its ultimate orders does not exist in this case. As stated by Commissioner Freas, dissenting (R. 1042):

"While it is true that the prescription of divisions

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[7] In this brief, the Administrative Procedure Act is quoted as it appears in the codification of Title 5 of the United States Code by Public Law 89-554, 80 Stat. 378 (Sept. 6, 1966). The opinion of the district court, as well as papers filed in that court, quote the slightly different text of the Act prior to codification. The legislative purpose of the codification "is to restate, without substantive change, the laws replaced . . ." Public Law 89-554, § 7(a).

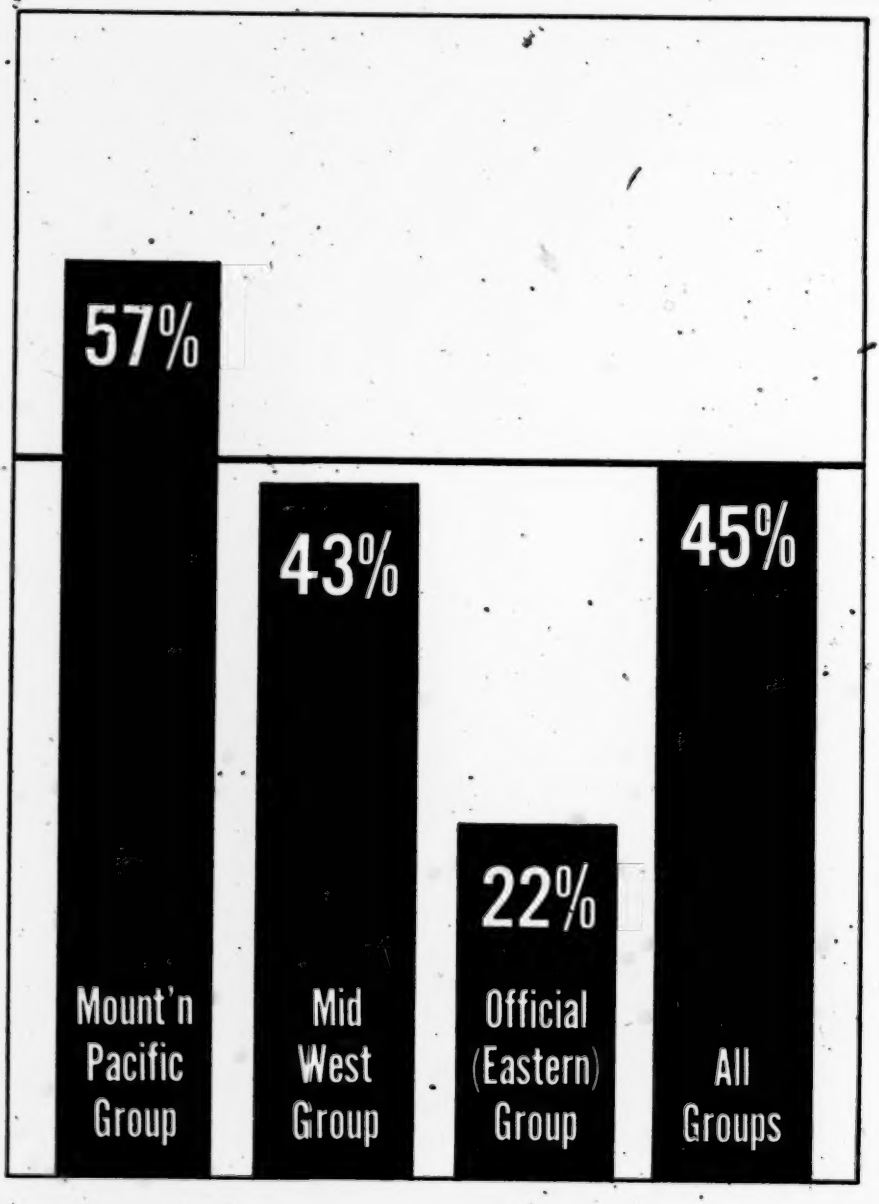
> involves the exercise of judgment, there must nevertheless be a clear enunciation of the reasons, with appropriate reference to the facts relied upon, for the conclusion reached. Section 8(b), Administrative Procedure Act. Here the gap between the evidence and the ultimate findings is not bridged."

Appellants do not challenge Commissioner Freas' point that there is no direct connection between the evidence and findings and the orders in this case. They concede, as they must, that "when the Commission constructed divisional scales for application between the Midwestern and Mountain-Pacific lines it did not, as a matter of arithmetic, use cost figures for that purpose" (C&NW Brief, p. 48). Indeed, Midwestern appellants do not contend that the Commission's ultimate order—in the form of divisional scales—has any independent integrity as producing lawful divisions; appellants' claim is that these scales are merely a "mechanism" to produce increases for the Midwestern railroads (C&NW Brief, pp. 48, 89, 94, 99). Nonetheless, they maintain that "the Commission's reports . . . establish a rational relationship between the scales prescribed and the findings of fact [as to costs] to which they were addressed" (C&NW Brief, p. 93), because the Commission's cost findings indicate "moderate increases" in Midwestern divisions, and the Commission's orders produce these "moderate increases" (C&NW Brief, pp. 34-35, 39-40, 94; U.S. Brief, pp. 24-25, 51-52).

Appellants' entire argument is a play on the words "moderate increases." They seek to capitalize on the inherent vagueness of that term to obscure the lack of any actual connection between any costs determined by the Commission and the ultimate orders which it entered.

But appellants are unable to make "moderate increases" a meaningful term. It certainly cannot mean that the Commission's orders provide for uniform increases in the

Amounts by which Revenues from Present Divisions Exceed Costs of Handling Official-Transcontinental Traffic



present divisions of the Midwestern railroads. The increases actually resulting under the Commission's orders, as set forth in Appendices A and B hereto, vary too widely to permit any such interpretation. And, with individual increases ranging as high as 146 percent, the term "moderate increases" cannot cover increases of the kind prescribed here.

Nor can the words "moderate increases" be related to the aggregate effect of the Commission's prescription in the context of the cost determinations of the Commission upon which appellants rely. Although resting their whole case on the Commission's "restatement" of costs as the basis of the Commission's action, appellants do not even attempt to relate those costs to the Commission's orders. Moreover, what appellants do say about the Commission's cost determinations is quite misleading, especially the partial chart shown at page 17 of Midwestern appellants' brief. The full "restatement" of the costs made by the Commission for transcontinental traffic moving between Eastern (Official) territory and Mountain-Pacific territory, with the Midwestern railroads as intermediate (or bridge) carriers, is shown in the chart that appears on the opposite page.[8] As shown, the discrepancies between these revenues and the costs as "restated" by the Commission were almost entirely a matter of concern as between the Eastern group and the Mountain-Pacific group (a controversy which has since been settled). The Midwestern railroads were found to be receiving practically the same revenues under the

[8] The percentages by which revenues exceed costs shown for the carrier groups are those set forth in the Commission's report (R. 1012). The percentage by which the revenues for the entire Official-Transcontinental traffic exceed costs (45%) is calculated on the same basis from the total "Revenue as settled" ($21,357,332) and the "Restatement" of costs ($14,710,725) (R. 1009).

present divisions as they would be entitled to on the basis of the costs as "restated" by the Commission.

The cost and revenue figures underlying the chart indicate that, on the basis of costs as "restated" by the Commission, the Midwest would receive an increase of only 0.3 percentage points in their present divisions as intermediate (bridge) carriers of Official-transcontinental traffic (R. 1011, col. (4)). An increase of 0.3 percentage points is the equivalent of an increase of 1½ percent in the Midwestern railroads' present divisions of Official-transcontinental traffic (0.3 as a percentage of 19.5) (R. 1011). But it is apparent from the increases which the Midwestern appellants would receive under the Commission's orders for their bridge hauls (as shown in Appendix B hereto) that the prescribed divisions accord the Midwestern appellants far more than that.[9] The Commission's orders thus would give the Midwestern appellants far greater increases than could be justified by costs, even on the premise that the Commission's cost findings were supported by substantial evidence relating to the costs of transcontinental traffic and were otherwise lawfully determined (which they were not, as discussed at pp. 90-93, *infra*).

What has happened in this case is that the Commission has entered orders prescribing a formula or "mechanism" (C&NW Brief, p. 89) for determining divisions for particular movements of freight traffic which is not "constructed or justified by cost" (R. 1078-1079). As a result, the Com-

[9] The same is true of the increases prescribed for Midwestern appellants' hauls of Midwest-transcontinental traffic. Compare the prescribed increases shown in Appendix A hereto with the 4.4 percentage point increase shown under the Commission's cost determination (R. 1011). An increase of 4.4 percentage points is the equivalent of an increase of 16 percent in the Midwestern railroads' present divisions of Midwest-transcontinental traffic (4.4 as a percentage of 27.1) (R. 1011).

mission's ultimate orders would distribute the revenues of particular shipments over particular routes without regard to costs. Even if Midwestern appellants were correct in their claim that the Commission's orders would produce for the Midwest *as a whole,* approximately the same result as would be produced by an order based on costs (and the Commission made no such finding with respect to the Midwest), the "mechanism" which the Commission prescribed in its ultimate orders would give some Midwestern railroads more, and other Midwestern railroads less, than would divisions based on costs.

The eight Midwestern appellants were the winners in this lottery. They are attempting to sustain the orders of the Commission, not because they would receive "moderate increases," but because they would receive very substantial increases. Indeed, when the Examiners recommended for the important Chicago-Council Bluffs haul the very same divisions that were later prescribed by the Commission, the Midwestern appellants themselves described that recommendation as providing "substantial" increases.[10] When the

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[10] The Midwestern railroad group (including at that time appellees Frisco and Katy) filed Exceptions to the Examiners' report, dated April 5, 1961, stating (pp. 3-4):

> "For the Eastern lines, the Examiners recommended what is described as 'a moderate general increase.' . . : In the Midwest, the Examiners recommended a number of increases, *some substantial* and some modest, and a number of reductions, many of which are drastic. . ..
>
> "The *major increases* recommended by the Examiners for the Midwestern lines are in Midwest-East Territory, the area lying generally between Lake Michigan, Chicago, Peoria, and East St. Louis on the east, and the Missouri River cities, the Twin Cities, and Duluth, on the west." (Emphasis supplied.)

The divisions recommended by the Examiners for the Chicago-Council Bluffs haul were the same as the divisions prescribed by the Commission and set forth as examples in the Midwestern appellant's brief (Compare R. 763, item 1, with C&NW Brief, p. 4c, and R. 782, item 3, with C&NW Brief, p. 2c).

same increases in the same divisions can be described by the same parties as "substantial" before the Commission and "moderate" in this Court, it is apparent that the term "moderate" lacks any real meaning. "Moderate increases" is not a meaningful finding. It is a non-finding.

In its recent decision in the Penn-Central merger case, *Baltimore & O. R. Co.* v. *United States,* — U.S. — (35 Law Week 4271, decided March 27, 1967), this Court once again made it plain that Commission orders must be consistent with, and sustained by, Commission findings. On this basic rule of law, there was no disagreement between the majority of the Court and the dissenting Justices (see 35 Law Week at 4276, 4300). And in the instant case, unlike the recent *Penn-Central* case, there is no ground for disagreement as to whether the findings do in fact sustain the orders. The Commission made no attempt to relate the prescribed divisions to any findings and, indeed, specifically disclaimed any duty to do so (R. 1066-1070, 1078).

The Midwestern appellants' heavy reliance in this Court on "moderate increases" is simply an effort to select vague language from the Commission's reports and seize upon it as justification of everything in those reports that stands otherwise unjustified. But appellants' theory merely emphasizes that the Commission's action cannot be sustained. For their reliance on a term as vague as "moderate increases" demonstrates that the Commission's reports are inadequate to show "the reasons and basis" for the Commission's orders as required by the Administrative Procedure Act or to show the "rational connection between the facts found and the choice made" as required by the *Burlington Truck Lines* case. If, as appellants contend, the Commission's orders are based upon findings with respect to costs of service, its reports must show to reviewing courts the connection be-

tween cost findings and divisions prescribed. That they fail to do.

C. Appellants' Efforts to Have This Court Make Its Own Cost And Traffic Findings Cannot And Do Not Sustain The Prescribed Divisions.

Appellants apparently themselves realize the deficiencies inherent in their contention that the gap between the evidence and the findings and the orders in this case can be bridged by reliance upon the term "moderate increases." Accordingly, they attempt to have this Court itself create a bridge to support the Commission's orders by making findings of fact on the basis of asserted cost and traffic data not taken from findings of the Commission or supported by evidence of record.

For example, appellants assert that appellees would be better off under the Commission's orders than under divisions based upon costs (U.S. Brief, pp. 25, 56,; C&NW Brief, pp. 40, 70-71, 95, 96).[11] In making this assertion, appellants rely upon a calculation based entirely on territorial average cost scales and average hauls for Midwest-transcontinental traffic (U.S. Brief, p. 56, note 41; C&NW Brief, pp. 70-71). Such use of averages is most misleading. As Midwestern appellants admit, the average hauls used are *"territorial*

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[11] Appellants also suggest that appellees have no cause for complaint because "they have not asserted that the prescribed divisions will not be compensatory," or "will not produce revenues that exceed by a substantial margin their costs as determined by the Commission" (C&NW Brief, pp. 72-73; see also U.S. Brief, p. 53). If this be the test, as it is not, Midwestern appellants have no basis for complaining about continuing the present divisions since, on their own theory, they are already receiving revenues which exceed their costs by 43% on Official-transcontinental traffic and 39% on Midwest-transcontinental traffic (C&NW Brief, p. 16).

averages of all railroads in each territory, and are different from the average hauls of groups of carriers" (C&NW Brief, pp. 70-71, note 62); and the average is also different from the average hauls of the eight appellant Midwestern railroads, separately or as a group. Moreover, the average costs applied to the average hauls are not even taken from the "restatement" of costs determined by the Commission but are so-called Rail Form A territorial average costs (C&NW Brief, p. 70, note 61).[12] As Mr. Justice Brandeis stated in a railroad divisions case, "averages are apt to be misleading." *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274, 291 (1924). Comparison of the increased divisions actually prescribed by the Commission with the Commission's "restated" cost determinations shows that the prescribed increases greatly exceed increases justified by any cost findings (pp. 31-33, *supra*).

The Midwestern appellants attempt further to propel this Court into the administrative domain by asking it to accept as facts the results of Midwestern traffic studies which are not in any record. It is asserted that the prescribed divisions would increase the revenues of the eight Midwestern appellants by $11,638,000 dollars per year, which would increase the present revenues of these appellants by approximately 11 percent (C&NW Brief, pp. 73-74). Such an increase in annual revenues, for eight railroads representing only one-third of the Midwestern rail-

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[12] The costs used by the Midwestern appellants in their calculations do not even purport to measure the costs of transcontinental traffc here at issue. Appellants' costs, taken from Exhibit MW-773 (C&NW Brief, p. 71, note 62), are based upon "average weight trains" and also exclude "special services & Edwards' detailed adjustments" (R. 631, 633, 639). Such an average cost scale departs from the costs of transcontinental traffic to an even greater degree than the Commission's so-called "restatement" of costs (discussed at pp. 90-93, *infra*).

roads' participation in transcontinental traffic,[13] can hardly be characterized as "moderate," whatever that word may mean.

Midwestern appellants admit that the figures underlying the $11,638,000 estimate are not in the record before the Commission, but state they are taken from "information in the public records of the Commission" (C&NW Brief, p. 73). This refers to estimates made by the Midwestern railroads themselves and included in reports which they filed with the Commission. There is no way of knowing whether these estimates are mere guesses, or are based upon some kind of traffic studies by the eight railroads. In any event, the figures have never been introduced in evidence, subject to cross-examination and rebuttal.[14] Furthermore, the denominator used in calculating the estimated percentage increase is based on 1953 data, whereas the numerator is said to represent figures for 1965, twelve years later (C&NW Brief, App. D).[15]

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[13] On the basis calculated by the Midwestern appellants, the annual revenues of these eight railroads from transcontinental traffic under the present divisions are $110,208,000 (C&NW Brief, App. D). Using the same sources, the total revenues of all Midwestern railroads are $309,865,000 (R. 984, 987).

[14] We have examined the reports which the eight Midwestern appellants have filed with the Commission for 1965 and are unable to reconcile the reported figures with the $11.6 million total relied upon by appellants. It may be that the figures reported for appellant Chicago, Milwaukee, St. Paul and Pacific R. Co. have been adjusted in some manner, but it would appear from later reports filed by that railroad that the adjusted total of the eight Midwestern railroads' reports should exceed $12 million.

[15] Moreover, the inclusion of appellant Chicago, Milwaukee, St. Paul & Pacific R. Co. in the figures distorts the result because that road has extensive operations in Mountain-Pacific territory. Midwestern appellants indicate that the revenue figures for the Milwaukee Road are "incomplete" (C&NW Brief, App. D). It is

The Midwestern appellants attempt to excuse their reliance on extra-record traffic data by charging that appellees withheld necessary facts from the Commission (C&NW Brief p. 72). Actually, precisely the contrary is true. The Mountain-Pacific railroads offered in evidence and repeatedly urged that the Commission receive all of the detailed cost and traffic data from which the Commission could have determined the costs related to, and the revenue effect of, any divisions which it prescribed (R. 889, 891-892). This evidence was excluded from the record, and not even marked for identification, on the objection of counsel for Midwestern appellants (R. 113-123). Appellants are in no position to accuse appellees of withholding data from the Commission when the effect of the Commission's orders could have been calculated from necessary data of record but for the objection successfully urged before the Commission by Midwestern appellants themselves.

In any event, this Court is not the forum in which to litigate the merits of particular divisions, or to pass upon the accuracy of appellants' efforts to justify the results of

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true that these figures omit the revenues as to which the Milwaukee Road provides the entire transcontinental service between interchange with Eastern roads at Chicago and origin or destination in Mountain-Pacific territory. But because such revenues present no divisions controversy as between Midwestern and Mountain-Pacific railroads, this omission does not "understate" total revenue derived from transcontinental traffic and subject to division by the Commission's orders, as Midwestern appellants assert (C&NW Brief, App. D). Actually the inclusion of revenues from traffic which the Milwaukee Road carries to interchange far inside Mountain-Pacific territory overstates the revenues of Midwestern railroads for operations in Midwestern territory (see Exhibit T-363, Tr. 3630), and thus understates the percentage increase in the Midwestern railroads' revenues.

Commission action on the basis of controversial calculations not made by the agency itself.

As this Court held in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "'[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . .'"

This rule was reaffirmed with specific reference to review of orders of the Interstate Commerce Commission under the Administrative Procedure Act in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962). The Court again reaffirmed these rulings in *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965):

> ". . . the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action. . . .' Burlington Truck Lines v. United States, supra, 371 US at 168; see Securities & Exchange Comm'n v. Chenery Corp., 332 US 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, 332 U.S. at 196."

Appellants are improperly attempting to "propel" this Court into the administrative "domain" when they ask this

Court to make findings of fact with respect to costs and revenues.[16]

D. The Commission Has Subsequently Repudiated The Notion That It Was "Impossible" to Connect Its Ultimate Orders With Any Facts Found.

The ultimate orders of the Commission consist of "divisional scales" used to calculate divisions of revenues as between Midwestern and Mountain-Pacific railroads. As previously shown, the Commission specifically disavowed costs of service as the basis or justification of these scales (R. 1078-1079).

Appellants contend that the Commission gave "ample supporting reasons" for the choice of the prescribed scales (U.S. Brief, p. 55; see C&NW Brief, p. 90). But these so-called reasons are completely negative, showing the rejection of proposals by the parties (C&NW Brief, pp. 91-92). What appellants come to is an effort to support the notion expressed by the Commission that any attempt to relate its ultimate order to anything of record was "impossible," and that it was thus "necessary" for the Commission to retire behind Delphic references to the exercise of undefined judgment (R. 1077):

"In determining just, reasonable, and equitable divi-

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[16] The same is true of Midwestern appellants' reliance upon "mileage prorates," and relative "service" measured only in miles, in an effort to persuade this Court that their present divisions are unfair (C&NW Brief, pp. 14-15, 96). There is no basis for simply assuming, as Midwestern appellants do in their calculations, that a mile of service across the plains of the Midwest is the equivalent of a mile of service in Mountain-Pacific territory, where each car of transcontinental traffic must be hauled over a series of mountain ranges.

> sions herein, the process we employed was one of practical judgment and not of mere mathematical computation. We found it *impossible* to use any existing divisional scale, a cost scale, or any method suggested by the parties as an exclusive guide or specific pattern for the divisions to be prescribed. In our view of what the evidence shows as to the equities of the situation, we *necessarily* had to exercise our judgment." (Emphasis supplied.)

The Midwestern appellants call the foregoing statement a finding (C&NW Brief, p. 91, note 89). It is not a finding, but a refusal to make findings.

The Commission's statement is also demonstrably incorrect. It can no longer be contended that it is "impossible" for the Commission to prescribe divisions rationally related to evidence of record because the Commission has done just that in other railroad divisions cases, in compliance with the holding of *Burlington Truck Lines, supra,* 371 U.S. at 167-168.

Akron, C. & Y. R. Co. v. *Atchison, T. & S. F. Ry. Co.,* 316 I.C.C. 351 (1962), was a companion case to the transcontinental divisions controversy now before this Court. The Commission there issued an order prescribing, for application to traffic moving between the East and points in Western Trunk Line territory,[17] divisional scales similar to those prescribed by the orders now under review (see 316 I.C.C. at 371). In the transcontinental divisions reports now under review, the Commission relied on its *Western Trunk Line* report as a precedent for basing its ultimate order upon "judgment and discretion" without reference to costs or any other identifiable standard (R. 1079, note 1).

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[17] That portion of the Midwest generally north of the Oklahoma-Kansas border.

Subsequently, however, the Commission's order in the *Western Trunk Line* case was set aside by a three-judge court in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 225 F. Supp. 584 (D. Colo. 1964). That court, in an opinion by Judge Doyle, held that the Administrative Procedure Act must be enforced in railroad divisions cases and that the Commission must make findings relating its ultimate order to the standards of Section 15(6) of the Interstate Commerce Act (225 F. Supp. at 600-607).[18] The Commission did not appeal that decision. This shows that the Commission no longer shares the view of counsel for appellants that making rational findings supporting its ultimate order in a divisions case, as required by Judge Doyle's opinion, is "impossible." Further Commission proceedings were instituted on remand, and the *Western Trunk Line* controversy was later settled.

After the Colorado district court set aside its order in the *Western Trunk Line* case and the court below set aside its orders in the instant case, the Commission issued a report in a reopened divisions controversy between railroads in Official and Southern territories. In an earlier *Official-Southern Divisions* case, 287 I.C.C. 497 (1953), the Commission had prescribed the very divisional scale prescribed in the orders now under review—referred to as the "29886

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[18] The Government attempts to distinguish Judge Doyle's opinion on the ground that the point decided was "a failure by the Commission to consider all of the factors listed in Section 15(6)" (U.S. Brief, p. 60, note 44). To the contrary, Judge Doyle expressly held that the Commission had failed to observe the standards of Section 8(b) of the Administrative Procedure Act, and that the requirements of the *Burlington Truck Lines* case were "intended to have teeth" and "should not be relaxed" in a case "where the choice is among a variety of divisional scales" (225 F. Supp. at 606-607).

scale."[19] The 1953 *Official-Southern* decision was relied upon by the Commission in its reports in the instant case as the principal precedent for basing its ultimate order upon undefined discretion in contrast to costs of service (R. 1078-1079).

Thereafter, however, in the reopened *Official-Southern* proceeding, the Commission completely repudiated its prior approach. *Official-Southern Divisions,* 325 I.C.C. 1 (1965). The Commission's report on further hearing in that case was written by Commissioner Freas, who had dissented in the instant case on the ground that the Commission's action violated the Administrative Procedure Act (R. 1042, see pp. 28-29, *supra*). Far from finding it "impossible" to relate its ultimate order to any rational standard, the Commission directly related the divisions prescribed to specific cost findings (325 I.C.C. at 37, 49).[20]

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[19] See C&NW Brief, pp. 25-26. The scale takes its name from the Commission's Docket No. 29886, *Official-Southwestern Divisions,* 287 I.C.C. 553 (1953). It was prescribed on the same day in both that docket and in *Official-Southern Divisions,* Docket No. 29885. Note the identity of the prescribed scales in Docket No. 29885, 287 I.C.C. at 552 (column 1), in Docket 29886, 287 I.C.C. at 595, and in the present case (R. 1101-1102).

[20] Those cost findings were subject to questions of whether they were supported by substantial evidence and reasoned findings relating to the costs of handling the traffic at issue, as contrasted to the average costs of handling all traffic. (See dissenting opinion, 325 I.C.C. at 53.) These and other legal questions, which are also presented by the Commission's cost determinations in this case (*infra,* pp. 90-93), are under review in an action brought by the Southern railroads and the Southern Governors' Conference, now pending before a three-judge court in the Eastern District of Louisiana. *Aberdeen & Rockfish R. Co.* v. *United States* (Civil Action No. 15454).

Division 2 of the Commission also based an order prescribing divisions directly on specific cost findings in *Louisville & Nashville R. Co.* v. *Southern Ry. Co.,* 319 I.C.C. 639, 658, 660-661 (1963)

What the Commission did find impossible in its recent *Official-Southern* report was to prescribe again the so-called "29886 scale." It expressly found that that very scale "unlawfully depresses the revenues of the long-haul carriers" (325 I.C.C. at 37).

Appellants attempt to brush aside the Commission's action in the *Official-Southern* case by arguing that it was a different case with different parties and different issues (U.S. Brief, p. 55; C&NW Brief, p. 97). That, of course, is true; but it does not help appellants here because a principal defect in the divisions prescribed in the present case is that the Commission did not design them to reflect the evidence in this record but, instead, used the so-called 29886 scale prescribed 14 years ago in a different case with different parties and different issues.

Moreover, the pertinent issue in the 1965 *Official-Southern* divisions was not different from the issue involved here. The Commission was considering the lawfulness of the same divisional scale under the same standards of Section 15(6). The Southern railroads challenged the Commission's prior concept, relied upon in the instant case, that a divisional scale should follow the pattern of a rate scale (R. 1079; U.S. Brief, p. 55; C&NW Brief, pp. 90-91).[21] The Southern railroads' argument was that

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(report by Commissioner Freas). In that case, the Commission found it appropriate "to deviate from Rail Form A" to reflect the costs of the specific traffic in issue (319 I.C.C. at 654), and the Commission's action was sustained on judicial review. *Carolina & N. R. Co.* v. *United States*, 234 F. Supp. 112 (W.D.N.C. 1964), aff'd 380 U.S. 526 (1965).

[21] The theory, as stated here, is that "it is reasonable to divide the rates to some extent in accordance with the way they are made" (R. 1079; U.S. Brief, p. 55; C&NW Brief, p. 91). Whatever its legal merits, this theory is irrelevant in the present case because

a rate scale is depressed below the progression of costs at the longer hauls for commercial reasons neccessary to move traffic, and that these considerations have no lawful bearing on the division of rates after the traffic has moved; precisely the same argument was made by appellees in the present case.[22] When the Commission actually faced up to the task of justifying the same "29886" divisional scale in light of the standards of Section 15(6), as it was required to do by Judge Doyle's opinion (*supra,* p. 42), the Commission was unable to do so and concluded that the scale "unlawfully depresses the revenues of the long-haul carriers" (325 I.C.C. at 37). This was a ruling under Section 15(6) equally applicable to the same scale prescribed in the instant case.[23]

The Commission's decision in the *Official-Southern* case

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uncontroverted evidence shows that the transcontinental rates were not made in relation to any rate scale (R. 75, 147-148).

[22] The Southern railroads argued that a "rate scale does not reflect the cost progression but, instead, is the result of commercial and traffic considerations, necessary to move the traffic, but having no lawful bearing upon the division of the joint rates." Exceptions of Southern Territory Railroads, dated October 25, 1963, I.C.C. Docket 29885, *Official-Southern Divisions,* p. 177.

Appellees in the instant case took the same position before the Commission on brief (R. 645-672), and at the hearings (R. 76, 188-275).

[23] Appellants' reliance upon *Boston & Maine Railroad* v. *United States,* 208 F. Supp. 661 (D. Mass. 1962), aff'd 371 U.S. 26 (1962) (U.S. Brief, pp. 58-60; C&NW Brief, pp. 26, 100, note 101), is misplaced. The essential question in that case concerned the need for consistency in the application of a divisional scale to border areas of the Official and Southern territories for which the scale had been prescribed in 1953 (208 F. Supp. at 667, 676-677). Following the prescription of a new basis of divisions in the reopened *Official-Southern* case, the Commission likewise reopened the border area proceeding in which it had issued the order reviewed in the *Boston & Maine* case (Order in I.C.C. Docket No. 32055, dated August 5,

also repudiated the 15 percent division prescribed for transcontinental traffic originated or terminated by the Midwestern appellants in Southeastern Illinois. This division would apply to a shipment on which a Midwestern railroad hauled the car 50 miles in Illinois to interchange with an appellee for a haul of over 2,000 miles to the Pacific Coast. Thus, for performing less than 3 percent of the mileage, the Midwestern railroad would receive 15 percent of the revenue. Of course, the Midwestern railroad should receive an allowance for terminal costs, but no cost evidence in the record justifies even half of a 15 percent division.[24] The

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1966). Moreover, the Commission order reviewed in the *Boston & Maine* case, unlike its action here which disclaimed cost justification, was justified with specific reference to unusually high terminal costs at Louisville, Ky. (208 F. Supp. at 667, 672).

The Midwestern appellants also assert that the differences in the average hauls of the carriers are "not so substantial as to indicate [that the construction of the divisional scales prescribed] could be substantially prejudicial to the Mountain-Pacific lines" (C&NW Brief, p. 96). This is not so. The Mountain-Pacific railroads stated before the Commission that the construction of the divisional scales inconsistent with cost was prejudicial to them (R. 913-918). The Commission did not question that the construction of the scales injured the Mountain-Pacific railroads, but held on the merits that its order was not intended to be "primarily a matter of costs" (R. 1078). Thus, when the Midwestern appellants erroneously assert that the irrational construction of the Commission's ultimate order was not prejudicial to the Mountain-Pacific railroads, they are making a "*post hoc* rationalization" for Commission action on grounds not accepted by the Commission itself. Such arguments are not permitted under the rule of the *Chenery* case (p. 39, *supra*).

[24] The cost evidence cited by Government counsel in the court below would not have justified a division in excess of 7 percent (U.S. Brief in district court, p. 60). The "increasingly burdensome" terminal costs relied upon by appellants (C&NW Brief, p. 103) would have to continue to increase at the rate relied upon for over 60 years before a 15 percent division could be justified by costs

Commission relied upon a supposed past practice of providing a 15 percent "minimum" in support of its action in this case (R. 1036-1037), but there was no past practice justifying a 15 percent minimum for short hauls where the total haul even approached the distances involved in this transcontinental divisions case (R. 76, 276-280). In any event, prescription of a 15 percent minimum without regard to any standard of Section 15(6) was expressly repudiated in the Commission's decision in the *Official-Southern* case (325 I.C.C. at 38).

It is ironic that the Midwestern appellants now attempt to piece together from the Commission's reports a connection between the divisions prescribed and costs, for it was these same Midwestern railroads who successfully urged the Commission *not* to base its order upon costs. Before the Commission, the Mountain-Pacific railroads objected to the prescribed divisions on the ground that they were not "constructed or justified by cost" (R. 1078). But the Commission, accepting an argument of appellant Midwestern railroads, expressly held that the divisional scales prescribed in its ultimate order were not "primarily a matter of costs" but a matter of "discretion and flexibility of judgment" (R. 1078-1079), whatever that means.[25] Having succeeded in having the Commission reject costs as

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(see plaintiffs' reply brief in district court, pp. 49-50). The district court briefs cited are included in the record on appeal filed in this Court.

[25] In replying to the Mountain-Pacific railroads' Petition for Reconsideration before the Commission, the Midwestern railroads stated (Reply dated September 11, 1963, p. 70):

> "The use of the 29886 divisional scales as a basis for dividing rates in Western Territory is further attacked by the Transcontinental Defendants (p. 157) on the ground that no 'cost justification' is set forth in the report. This contention rests on the false premise that the construction of a divisional scale is primarily a matter of costs and mathematics. In *Official-*

the basis of its orders in this case, appellants should not be permitted to sustain the Commission's orders on the theory that its orders are based upon costs.

More fundamentally, the Commission's action in the *Official-Southern* case makes untenable appellants' arguments in this Court that it is "impossible" for the Commission to comply with its duty under the Administrative Procedure Act to "articulate [a] rational connection between the facts found and the choice made." *Burlington Truck Lines, supra,* 371 U.S. at 168. If, as appellants argue in this Court (albeit erroneously), the Commission based its prescription of Midwestern divisions on costs and costs alone, the choice of the ultimate order should necessarily be justified by costs. That is what the Commission did in the *Official-Southern* case, but what the Commission expressly refused to do in this case (R. 1078).

Nor can the Commission's orders be defended on the theory that, because it found the Midwestern railroads were receiving a lesser proportion of revenues than their pro-

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Southern Divisions, 289 I.C.C. 4, 6-7 (1953), the Commission, after pointing out that costs do not control the contours of rate scales, stated that in a divisions case 'it is equally true that discretion and flexibility of judgment have attended the use of costs, particularly in determining the contours of divisional scales involving the relation of terminal and line-haul cost elements,' and that 'due consideration of the respective situations of long-haul and short-haul carriers requires that the solution be based on judgment rather than formula.' "

This argument was adopted *in toto* in the Commission's report on reconsideration (R. 1078-1079).

The Midwestern railroads also argued before the Commission, as they do in this Court, that the prescribed scale can be supported by a "stand-by charge" (C&NW Brief, p. 101, see also U.S. Brief, p. 55, note 39). Whatever a "stand-by charge" might be, it would be reflected somewhere in the costs which the Commission rejected as justifying the scale. There is no suggestion in the Commission's reports that it based its orders on any "stand-by charge" theory.

portion of costs, the Commission had discretion to choose any "mechanism" to increase the divisions of the Midwestern railroads (C&NW Brief, pp. 39-40).[26] Where, as here, the prescribed divisions were deliberately *not* "justified" by costs (R. 1078), there is a complete lack of a rational connection between the "mechanism" and any findings of any sort. In a case such as this, in which tens of millions of dollars of annual revenues are at stake, it is particularly true that "the choice of remedy is as important a decision as the initial construction of the statute and finding of a violation." *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 130 (1962).

In view of the Commission's very different approach in *Official-Southern Divisions,* no administrative policy is at

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[26] Appellants' reliance upon *Beaumont, S.L. & W. Ry. Co.* v. *United States,* 282 U.S. 74 (1930) (U.S. Brief, p. 56; C&NW Brief, pp. 89, 98, 99, note 100), is erroneous. In *Beaumont,* the Court held that "a sound basis for the rule or formula prescribing the divisions is essential to compliance with the Act" (282 U.S. at 87). The Court also held that the Commission had failed to state in its reports the grounds upon which its determination rested (282 U.S. at 86). The Court thereupon turned to the record and itself determined whether the order could be sustained (282 U.S. at 87-88).

This is not the law today. Where the Commission fails adequately to state the basis of its decision, the Commission's order must be set aside; this Court does not itself assume the administrative task of finding in the record a basis for the administrative action. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168-169 (1962); *NLRB* v. *Metropolitan Life Ins. Co.,* 380 U.S. 438, 443-444 (1965), quoting *Burlington Truck Lines,* and *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947).

Furthermore, in *Beaumont,* the Court upheld the Commission's order on the premise that it was justified by costs (282 U.S. at 88). No such premise can be indulged in here where the Commission itself has expressly found that its ultimate orders were not "constructed or justified by cost" (R. 1078).

stake in the present case. The Commission has abandoned any claim that there is anything about the administration of Section 15(6) that makes it impractical for the Commission to articulate a rational connection between its findings of fact and its orders prescribing divisions. The Commission having made this advance, a decision of this Court sustaining the anachronistic orders in this case would be a serious blow to the cause of rational administrative determinations.[27]

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[27] Compare Friendly, "The Federal Administrative Agencies: The Need for Better Definition of Standards," 75 Harv. L. Rev. 863, 867, 877-878 (1962):

> "The thesis presented is this: A prime source of justified dissatisfaction with the type of federal administrative action which I will shortly specify is the failure to develop standards sufficiently definite that decisions will be fairly predictable and that the reasons for them will be understood; this failure can and must be remedied."
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> • • •
>
> "I do not contend that economic regulation of business is susceptible of the same degree of definiteness as commercial law; I do suggest that, after three-quarters of a century of regulatory experience in the railroad field and of several decades in others, many patterns have recurred with sufficient frequency that it ought to be possible to articulate bases of administrative determination more specific than we have generally had."

with Hosmer, "In What Manner and to What Extent Does Cost of Service Play a Material Role in Rate and Other Matters Before the Interstate Commerce Commission?," 23 I.C.C. Practitioners' Journal 1085, 1094 (1956):

> ". . . my feeling is that the Commission ought not to be tied up to any kind of a rule as to whether they are going to do thus and so in case of a study which shows lack of out-of-pocket costs or whether it shows something above that. They are bound to find the rate unreasonable and all of that.
>
> "I think the fewer rules we have in this thing, the better. The more discretion the Commission has to look at all the

II. THE DISTRICT COURT CORRECTLY SET ASIDE THESE ORDERS ON THE GROUND THAT THE COMMISSION'S TREATMENT OF REVENUE NEEDS WAS UNLAWFUL

Because the Commission's orders prescribing Midwestern divisions were not based upon, and cannot be supported by, any findings with respect to relative costs of service, appellants' case in this Court collapses.

Appellants concede that, to sustain the Commission's orders, it is necessary to demonstrate that those orders rest upon findings supported by substantial evidence and relating to the factors stated in Section 15(6), and that there is a rational connection between such findings and the divisions prescribed (U.S. Brief, p. 57; C&NW Brief, pp. 67, 93). In short, it is agreed that the Commission may prescribe divisions only for a reason appropriate under Section 15(6) and may not draw them from thin air. Without costs as the basis of the prescribed Midwestern divisions, appellants are left with no basis at all to support the Commission's action, for they make no effort to show that the orders under review are supported by findings with respect to revenue needs. On the contrary, they repeatedly insist that revenue needs were the basis for increases in Eastern divisions only (*supra*, pp. 22-24).[28]

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evidence and the fewer rules that we get as to the character of evidence, and so on, the better for the Commission."

The author of the latter statement was the Senior Examiner in this case (R. 48), who remained with the Commission as a special consultant for the instant case until service of the Commission's supplemental report.

[28] The Midwestern appellants say, furthermore, that if the Commission is to prescribe divisions giving carriers "an amount of revenue from the service involved greater than they would receive on the basis of their relative contributions to the costs of that service"—i.e., increased divisions justified by revenue needs—it "must find that the increased divisions are required in the public

Nevertheless, as we have shown, revenue needs were a material issue in the Commission's proceedings and a major factor in its decision to increase Midwestern divisions (*supra*, pp. 7, 9, 22-26). That was the case presented to the district court and the case on which that court ruled. Appellants' attempt in this Court to secure a reversal of the district court's judgment by arguing a question that the court did not consider: The question of what findings might suffice as "due consideration" of revenue needs in a case where revenue needs were not, even in part, the basis of the Commission's prescription of increased divisions. That question was not before the district court and it is not before this Court.

In this case, the Commission specifically rejected costs and chose to prescribe divisions which it said would "reflect certain broader aspects of revenue need" (R. 1032). Yet the Commission found neither the amounts of the revenue needs of the carrier groups nor the financial effect of its orders. This treatment of the revenue needs issue was unlawful.

Appellants do not suggest that the Commission made any findings that reveal what amount of money it thought was required to meet the revenue needs of any group of railroads or how much the increased divisions it prescribed would affect the revenues of the railroad groups. As the Government says, "The adjustments made in the Midwest-Transcontinental divisions were not intended to produce any specific increase or decrease in the revenues of any carrier group or provide any certain amounts of dollars to satisfy particular revenue needs." (U.S. Brief, p. 53).

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interest to maintain the carriers in effective operation as a part of an adequate transportation system" (C&NW Brief, p. 44). No such finding with respect to the Midwestern divisions appears in the Commission's reports.

The Commission having based its order increasing the divisions of the Midwestern railroads upon revenue needs, "the amount of revenue required" by the carriers, and the effect of its orders upon those revenue needs were "material issues" under Section 15(6) of the Interstate Commerce Act,[29] as to which specific findings were required by Section 8(b) of the Administrative Procedure Act.[30]

This Court has made it plain that the Commission may not avoid material issues by unexplained appeals to administrative discretion of the kind that appear in the Commission's reports in relation to why and how the divisions it prescribed reflect the Midwestern railroads' revenue needs. In *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167 (1962), the Court ruled:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co.* v. *Federal Trade Comm'n*, 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and de-

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[29] Section 15(6) provides (49 U.S.C. § 15(6)):

"In so prescribing and determining the divisions of joint rates . . . the Commission shall give due consideration . . . to . . . the amount of revenue required to pay their ['the carriers concerned'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation . . ."

[30] Section 8(b) provides (5 U.S.C. § 557(c)):

"All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ."

> manding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U.S. 86, 90."

Without findings of either the amount of Midwestern railroads' revenue needs or the financial effect of the divisions prescribed, there is no way of knowing "the basis on which the Commission exercised its expert discretion" to increase the divisions of the Midwestern railroads "to reflect . . . revenue need" (R. 1032). Its discretion becomes "unbounded discretion," because there is no way to know how much additional revenue the Commission thought the Midwestern railroads needed, or what proportion of that revenue need it thought an increase in divisions of rates on transcontinental traffic—which constitutes only 15 percent of the total freight business of the Midwestern railroads (R. 995)—ought to contribute. In the absence of these findings, the Commission's orders amount to an effort to change carrier revenues by unstated and undetermined amounts for the purpose of meeting unstated and undetermined revenue needs. This turns the making of divisions into an administrative game of blindman's buff.

The findings essential to rational treatment of a revenue needs issue are established by this Court's opinion in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300 (1958). In that case, the Commission ordered an increase in intrastate passenger fares assertedly to meet revenue needs of the Milwaukee Road. In considering what findings were necessary to support increases prescribed to meet revenue needs, this Court held that the Commis-

sion's order was correctly set aside for want of a finding of the amount of revenue need to which the increases were intended to contribute (355 U.S. at 310, note 8):

> "It is axiomatic that to know whether something is a fair proportionate part of something else, we must be told what the something else is."

The Commission's findings in the instant case are even more deficient than its findings in the *Milwaukee Road* case. There the Commission at least found the financial effect of its order, both in terms of the total increase in fares which would result ($383,000) and the amount by which such an increase would cause revenues to exceed out of pocket costs ($77,000) (see 355 U.S. at 303). Here, the Commission found neither the financial effect of its order nor the amount of the Midwestern railroads' revenue needs. It is impossible to know "whether something is a fair proportionate part of something else" if no findings are made as to either the "something" or the "something else."[31]

The district court expressly relied upon this Court's decision in the *Milwaukee Road* case in holding that the Commission had not made adequate findings to support orders based upon revenue needs (R. 1725). Yet the Gov-

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[31] In the Transportation Act of 1958, Congress amended Section 13(4) to change the portion of the Court's holding in *Milwaukee Road* requiring that the Commission consider the revenue needs allocable to a particular State and to provide instead that the Commission consider the overall revenue needs of the carriers (72 Stat. 570-571). This change makes the *Milwaukee Road* principle all the more applicable to Section 15(6), which is also concerned with the carriers' overall revenue needs. The legislative history of the 1958 amendment makes it clear that Congress intended no change in the findings required with respect to the revenue needs of the carrier. H.R. Rep. No. 2274, 85th Cong., 2d Sess. pp. 11-12; 104 Cong. Rec. 15645, 15648 (1958).

ernment's brief does not even mention this decision. And the Midwestern appellants say that reliance upon the *Milwaukee Road* case "is misplaced," solely on the theory that "the Commission did not increase the Midwestern divisions to meet all or a part of some undetermined revenue need," but based its orders on costs alone (C&NW Brief, pp. 50-51, note 40). This is an acknowledgement that the Commission has not made sufficient findings to support an order based in any part upon revenue needs. And, since the Commission's orders are not based on costs alone (*supra*, pp. 6-7, 9, 22-26), the Commission's orders cannot stand.

In the present case the Commission defied the requirements of the Administrative Procedure Act and the *Milwaukee Road* decision by stating (R. 1068, 1070):

> "There is no rule, statutory or otherwise, requiring that, as a condition to the exercise of our authority in cases involving divisions, we must find in terms of dollar amount the difference between the revenue produced by lawful divisions as compared to the revenue produced by unlawful divisions."
>
> . . . . .
>
> " 'There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached.' " (Quoting from *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 359 (1936)).

This is the sort of administrative double-talk upon which appellants are forced to rely in the absence of necessary findings. But no one suggested that the Commission "disclose mental operations" or that it "specify the weight given to any item of evidence." What was requested were findings that would relate the divisions prescribed by the

Commission to the revenue needs such divisions were purportedly designed to reflect.[32]

Although the Commission quoted and relied upon the decision of this Court in the *B&O* case in reaching its conclusion, the issues heard and decided in *B&O* actually had nothing to do with the requirement of findings. The claim there was that the Commission's action was "arbitrary and in excess of statutory power" because the Commission had "subordinated all matters, which under § 15(6) . . . it is required to consider, to the element of the southern lines' supposed 'financial need'" (298 U.S. at 358). In deciding this substantive question the Court was not faced with, and did not pass upon, any question with respect to the findings necessary to a lawful exercise of discretion.

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[32] The Midwestern appellants assert that appellees did not make any request that the Commission find the amounts of revenue required or the financial effect of the new divisions "prior to the submission of the case to the Commission" (C&NW Brief, pp. 54-55, note 45; p. 68, note 58). This assertion is irrelevant because, far from refusing to consider the point because of any waiver, the Commission expressly stated appellees' claim (R. 1066-1067), and rejected that claim on the ground that such findings need not be made (R. 1067-1070). The assertion is also factually incorrect, because appellees made precisely the same claim prior to the Commission's initial report, in Exceptions to the Examiners' recommendations (R. 816).

Midwestern appellants' reference to appellees' requested findings (C&NW Brief, p. 68, note 58) is inapposite. Because the Mountain-Pacific railroads were requesting a flat 10% increase in their existing divisions (R. 692), the financial effect of such an increase was self-evident, is in the case of the 15% increase at issue in the *New England Divisions Case*, 261 U.S. 184, 187, 196 (1923). In contrast, the effect of the divisions recommended by the Examiners, or the entirely new structure of divisions prescribed by the Commission, could not be known without a separate finding of their financial effect.

That portion of the *B&O* opinion in which the Court stated that the Commission need not "disclose mental operations" is a far cry from a holding that the Commission need not support its decision with reasoned findings. Whatever might be the responsibility of the Commission to disclose the "mental operations" by which it arrives at such findings or the weight given the evidence on which they are based, it is clear that the Court regarded the findings themselves as indispensable.

The clearest proof of what the decision in the *B&O* case was intended to mean appears from the affirmative reliance by the Court upon its previous decision in *Florida* v. *United States*, 282 U.S. 194 (1931), as consistent with and supporting the very sentence in the *B&O* opinion which states that the Commission need not specify the weight of evidence or disclose its mental operations (298 U.S. at 359, note 23). The *Florida* case involved an order of the Commission increasing intrastate rates to remove an alleged burden upon interstate commerce. Although the basis of the Commission's action was its view that the rates prescribed were "needed to avoid an undue burden on the revenues of the carrier," it failed to find "the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier . . ." (282 U.S. at 212).

In setting aside that order, this Court made it plain that any order designed to reflect revenue needs must contain a finding as to its impact upon revenues (282 U.S. at 214-215):

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante,* p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. . . ."

Since this decision was expressly approved in *B&O* (298 U.S. at 359, note 23), the Court obviously did not overrule the requirement that findings as to revenue impact are an essential part of the consideration of the issue of revenue needs. The Commission had made findings in support of the order before the Court in the *B&O* case showing the financial effect of its order under the unique facts of that case[33] and the Court's citation of the *Florida* case shows that it regarded such findings as essential to the validity of Commission orders based upon revenue needs.

In any event, appellants' reliance upon a pre-Administrative Procedure Act decision such as the *B&O* case[34] is misplaced in this case decided under the provisions of that Act. The purpose and effect of Section 8(b) is clear. Congress was not satisfied to permit administrative agencies to issue reports which contained merely ultimate conclusions and

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[33] The *B&O* case presented an unusual situation in that the divisions which the Commission prescribed did not increase the revenues of the Southern railroads defending the order (298 U.S. at 353, 356; 194 I.C.C. at 734-735, 760; 198 I.C.C. at 381).

[34] Appellants' reliance upon *Alabama Great Southern R. Co.* v. *United States,* 340 U.S. 216 (1951), is also misplaced. That case did not involve any issue as to revenue needs. Moreover, the case

absolutely essential findings. In any proceeding in which other issues were presented, findings were to be made on those issues as well, so long as they were material, and administrative agencies were to include a statement of the reasons underlying such findings.

The legislative history of the Administrative Procedure Act shows that Congress intended that Act to apply to railroad divisions cases. At the hearings, the spokesman for the Commission, opposing the legislation, discussed divisions cases and contended that findings in the words of the statute had been sufficient (Administrative Procedure: Hearings before the House Committee on the Judiciary on H.R. 184, 1203, etc., 79th Cong., 1st Sess., pp. 79-80 (1945)):

> "[Commissioner Aitchison] . . . but I run my head up against the New England Divisions case. . . . That is more analogous, I would say, to rule making, yet it laid down a precise formula applicable to an individual rate—every individual rate.
>
> "The Chairman. What sort of formula, if you can tell us briefly, was laid down with reference to the division of rates?
>
> "Mr. Aitchison. They simply gave the New England lines a greater share than they were getting.
>
> "The Chairman. I asked what formula did they lay down.

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rested upon the provisions of Section 14(1) of the Interstate Commerce Act which "requires the Commission only to file a written report, stating its conclusions" (340 U.S. at 228). Although the *Alabama Great Southern* case was decided by this Court in 1951, it did not come under the Administrative Procedure Act of 1946 because the proceedings in the case were initiated in 1934 (340 U.S. at 218), and the Administrative Procedure Act did not apply "as to any agency proceeding initiated prior to the effective date" (60 Stat. 244). *Inter-City Transportation Co.* v. *United States*, 89 F. Supp. 441, 444-445 (D. N.J. 1948).

"Mr. Aitchison. The matter was covered by division sheets between the carriers themselves.

"The Chairman. Maybe a railroad man would know what that means, but it is not clear to me.

"Mr. Aitchison. You might say 'contracts'; it was covered by contracts between the railroads. But we said 'You have to modify your existing contracts by giving the New England lines 15 percent more than they are getting.'

"The Chairman. By what formula did you arrive at that conclusion?

"Mr. Aitchison. That was done by a study, as the law provides, of the revenue needs of the carriers.

"The Chairman. I am trying to get at the formula, though.

"Mr. Aitchison. The standards for the prescription of divisions are laid down in the statute itself and, among them, is the amount of money which is needed by the various carriers involved, and their importance to the public."

Thereafter, the Commission's request for exemption from the Act was rejected.[35]

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[35] S. Rep. No. 752, 79th Cong., 1st Sess., p. 5 (1945):

"The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill."

The breadth of Section 8(b) of the Administrative Procedure Act was described by Congressman Walter, one of the sponsors of the bill, on the floor of the House (92 Cong. Rec. 5653 (1946)):

"The purpose and effect of these provisions are clear upon the face of the section. One matter should be emphasized. Section 8(b) requires findings and conclusions to be stated upon all the material issues of fact which the parties may present. This means that, within the legal framework of the type of case involved, the number and subjects of the findings

Accordingly, under the Administrative Procedure Act and the *Milwaukee Road* case, the district court was clearly correct in setting aside the Commission's orders for lack of findings as to the amount of revenues required by the railroads and the financial effect of the prescribed divisions on the required revenues.[36]

Appellants attempt to avoid this issue by arguing at length that findings with respect to rates of return constitute adequate treatment of revenue needs in divisions cases (U.S. Brief, pp. 49-51; C&NW Brief, pp. 55-58). But all this discussion is beside the point. Rates of return, standing alone, do not measure the "amount of revenue required" under Section 15(6) but, instead, reflect what the railroads actually earned for the period covered. The rate of return actually earned may have little bearing on the amounts of revenue actually needed by the railroads to produce the "fair return" contemplated by Section 15(6).[37]

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and conclusions will be determined by the record and by the legal, factual, or discretion issues raised by the parties. The mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision."

[36] In *Atchison, T. & S. F. Ry. Co.* v. *United States*, 225 F. Supp. 584 (D. Colo. 1964), a Commission order prescribing divisions was set aside as violating the findings requirements of the Administrative Procedure Act where the Commission had failed to make findings as to "the relative revenue needs of the specific participating carriers," or to "the principal effect" of the new divisions on the transcontinental railroads (225 F. Supp. at 606-607). The Commission did not appeal in that case.

[37] Similarly, the Midwestern appellants' reliance upon Commission cases in which rates of return were recited (C&NW Brief, pp.

But even if rates of return were sufficient to measure the "amount of revenue required," the fact remains that the Commission did not find, in any form, the effect of the prescribed divisions upon the "amount of revenue required" by the carriers. Without finding the financial effect of new divisions prescribed to reflect revenue needs, the Commission cannot rationally have determined that the revenues under the new divisions would satisfy the revenue needs of the carriers, and thus be "just, reasonable and equitable" in light of the "amount of revenue required" as provided by Section 15(6).[38] It is one thing to consider

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55-56, note 46) is beside the point. Rates of return constitute a beginning, not the end, of an inquiry into the actual revenue needs of railroads, but standing alone they do not measure such needs.

[38] Acknowledging that rational consideration of the Commission's orders requires knowledge of the revenue effect, appellants have gone beyond the Commission's findings and the record in attempting to overcome this deficiency.

The Government's Jurisdictional Statement cited "approximately $45 million a year" as the revenue effect of the Commission's orders (U.S. Jur. St., p. 4). But the only source cited for that figure was the following equivocal statement of one of the four dissenting Commissioners (R. 1041):

> "Although the report is silent as to the actual amount of revenue the prescribed divisions would shift from the transcontinental lines to eastern and midwestern carriers, estimates indicate the figure would exceed $50 million annually."

The source of these "estimates" is not known.

The Midwestern appellants now feel obliged to assert, on the basis of material entirely outside any record (see pp. 36-37, *supra*) that the Commission's orders would have the effect of increasing the divisions of these eight railroads by $11,638,000 per year (C&NW Brief, App. D).

The Commission has had no difficulty in finding the financial effect of its orders in recent divisions proceedings. E.g., *Official-Southern Divisions*, 325 I.C.C. 1, 50 (1965); *Louisville & N. R. Co.* v. *Akron, C. & Y. R. Co.*, 309 I.C.C. 491, 493 (1960), *upheld sub nom. Boston & Maine Railroad* v. *United States*, 208 F. Supp.

relative rates of return and other data to conclude that no change in divisions should be made on the basis of revenue needs.[39] It is quite another matter to enter an order changing divisions on the express basis of revenue needs without findings on the material issues of what the revenue needs of the railroads are or what effect the order will have on these revenue needs. Such a lack of findings with respect to obviously material issues constitutes a plain violation of the requirements of Section 8(b) of the Administrative Procedure Act.

This Court recognized, in its *Milwaukee Road* opinion, *supra,* that findings of rates of return alone do not constitute findings adequate to support a Commission order in a revenue needs case. The Court expressly recognized that the Commission had made findings with respect to the rate of return of the carrier involved (355 U.S. at 308, note 7), but it nonetheless set aside the Commission's order for lack of adequate findings as to the specific revenue needs to be met.

Appellants distort the holding of the district court when they characterize it as a "prohibition. . . . against the Commission's use of rates of return" (U.S. Brief, p. 50). Plainly no such prohibition is either express or implied in that court's decision. The district court simply held, relying upon the *Burlington Truck Lines* and *Milwaukee Road* cases,

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661 (D. Mass. 1962), aff'd 371 U.S. 26 (1962); *Louisville & N. R. Co.* v. *Southern Ry. Co.,* 319 I.C.C. 639, 661 (1963), *upheld sub nom. Carolina & N. Ry. Co.* v. *United States,* 234 F. Supp. 112 (W.D. N.C. 1964), aff'd 380 U.S. 526 (1965).

[39] In *Official-Southern Divisions,* 325 I.C.C. 1 (1965), the Commission did not base its action on revenue needs (325 I.C.C. at 49-50) despite the fact that the differences between the rates of return of the respective groups of carriers in that case were greater than the differences in the rates of return relied upon by appellants in the present case (compare 325 I.C.C. at 14, with U.S. Brief, p. 10, and C&NW Brief, p. 19).

that the Commission, in entering orders which change divisions on the basis of "revenue needs" under a statute requiring consideration of the "amount of revenue required" by the carriers, must find the amount of the carriers' revenue needs and the financial effect of its orders "in order that any reviewing court may be enabled to determine if the statutory requirements have been met by the Commission" (R. 1723-1725).

The Government also expresses alarm because, in requiring that the Commission find what the revenue needs of the railroads are and what effect its orders will have on those revenue needs, the district court called for such findings "in dollars" (U.S. Brief, pp. 23-24, 45-46, 47-48).[40] Since "revenue needs" by definition concern the need for revenues, which are dollars, and since Section 15(6) calls for consideration of "the amount of revenue required," it is only appropriate that the findings to support an order changing divisions on the basis of revenue needs express, in dollar terms, the amounts of those needs and the effect of the order on those needs.

Analysis of appellants' argument, moreover, shows that they have no real objection to a requirement that the basis of the Commission's orders be stated in dollars, because appellants themselves rely upon "the dollar findings actually made" by the Commission (U.S. Brief, p. 48; see also C&NW Brief, pp. 15, 49, 60). The findings relied upon, however, relate only to costs, and not to revenue needs. Whether this would suffice if, as appellants claim, the Commission's orders prescribed increased divisions on the basis

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[40] The Government also asserts that the court below required a finding "in *exact* dollar amounts" (U.S. Brief, p. 46). (Emphasis supplied.) The word "exact" is added by the Government, not the court below. The Commission refused to make any finding at all, either exact or approximate.

of costs alone, and not at all on the basis of revenue needs, is a question not presented by this case (as shown at pp. 51-52, *supra*). In the same vein, the Government seeks to avoid the requirement that the Commission find the financial effect of its orders on the revenue needs of the railroads by arguing that such findings are not necessary where the prescribed divisions are based entirely on costs and are not "directed toward reflecting any revenue needs of the Midwestern group" (U.S. Brief, p. 52). Again, this is not responsive to the issues in this case in which the Commission did rely upon "revenue need" in ordering increased divisions for the Midwestern railroads.

In sum, the Commission did not find the amounts of revenue actually needed by any group of carriers or the financial effect of its orders, in terms of dollars or any other standard of measuring the revenue needs of the railroads. The district court correctly held that, in the circumstances of this case, findings beyond mere rates of return were necessary to resolve the material issues of revenue needs upon which the Commission stated that it had relied in ordering increased divisions for the Midwestern railroads.

III. THE COMMISSION'S ERRONEOUS TREATMENT OF PASSENGER DEFICITS CONSTITUTES AN INDEPENDENT GROUND FOR SETTING ASIDE ITS ORDERS.

A separate ground on which the Commission's orders were set aside by the district court was the unlawfulness of the Commission's treatment of passenger deficits (R.1733).[41]

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[41] None of the present appellants raised any question in this Court with respect to the passenger deficit issue.

For the apparent purpose of showing that they made no concession by failing to present the passenger deficit question in their jurisdictional statement, the Midwestern appellants argue that

This issue arose before the Commission in a most extraordinary way.

In presenting evidence on the revenue needs issue before the Commission, the Eastern and Midwestern railroads relied upon data—primarily rates of return—related to the financial results of the overall operations of the respective groups of railroads. This evidence purported to relate to "revenue needs" in contrast to the revenue required with respect to the particular transcontinental traffic at issue, referred to as "cost of service." *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 360 (1936) (see C&NW Brief, pp. 43-44).

Appellee Mountain-Pacific railroads presented evidence showing that rates of return did not measure their actual revenue needs. Appellees showed that, in order to meet the unique and growing service requirements of Mountain-Pacific territory, they have been obliged to increase their investment in cars, extensions of line and other railway property at a substantially greater rate than have the Eastern and Midwestern railroads and that such greater investments were necessary in order to move transcontinental traffic to and from Mountain-Pacific territory (R. 76, 291-293). They showed amounts of funds available and

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the district court's ruling on this question was either "a cautionary dictum" or part of a broader holding that the Commission's findings on revenue needs were insufficient (C&NW Brief, pp. 61-62. note 54). The ruling was no dictum. The district court held that the Commission's findings on revenue needs were insufficient, and one of the insufficiencies occurred in connection with the treatment of passenger deficits. The court below remanded the case to the Commission for further proceedings consistent with an opinion expressly directing "that the findings further show that, as required by Section 15(6), the Commission has considered the revenue needs of the carriers for *all* transportation services, including needs represented by passenger deficits" (R. 1733, 1756).

funds required for transportation operations (R. 140-145). They showed their primary dependence upon retained earnings as the source of funds for needed investment in rail plant and equipment (R. 76, 291). And they showed their earnings, in proportion to demands upon them for increased net investment, to be substantially inferior to those of the Midwestern railroads (R. 76, 293).

Appellees further showed that their earnings had not been adequate either to meet their need for investment funds or to provide a "fair return"—or indeed any return at all—on their increased capital investment. It was uncontroverted that an increase in the Mountain-Pacific railroads' investment in railway property of $800 million had not produced one penny of increased earnings (R. 76, 294). In short, appellees made a case for increased divisions to provide funds to meet their greater revenue needs requirements in order to serve the public. Appellees thus showed a need for greater divisions than would be provided on the basis of costs of service as measured by cost formulas.

Reading appellants' briefs, one would think that the Commission rejected the Mountain-Pacific railroads' showing of their greater revenue needs on the ground that rates of return provided the exclusive, or at least preferable, test of revenue needs (*e.g.*, U.S. Brief, pp. 48-49; C&NW Brief, pp. 52-55, 63). But this was not the basis of the Commission's action.

In rejecting appellees' evidence, the Commission relied upon consideration of their financial position "as freight carriers," deliberately separating out and excluding from consideration the effect on net earnings of their so-called passenger deficits. The Commission recited figures representing "passenger deficits" and a "complementary comparison of freight net railway operating income" (R. 1023-1024), which showed that the passenger deficits of the Mountain-Pacific (Transcontinental) lines had been increas-

ing by substantial amounts in recent years, whereas those of the Midwestern railroads had been increasing to a much lesser extent and those of the Eastern railroads had been declining. From these statistics, the Commission found that "the financial position of the mountain-Pacific lines as freight carriers in the postwar period as a whole has been better than that of . . . the other western lines" (R. 1025).[42]

It was because of the Mountain-Pacific railroads' supposed financial situation "as freight carriers" that the Commission rejected their evidence of heavy investment responsibility and lack of return on additional capital (R. 1026):

> "The comparisons of freight net railway operating income and passenger deficits also have a bearing on the assertion of the defendants that 'the increased investment required in serving the growing mountain-Pacific territory has produced no return for the owners of the mountain-Pacific roads.' This alleged deprivation results from passenger deficits of those roads, as will now be explained."

The Commission's explanation was that the Mountain-Pacific railroads' "freight net railway operating income" had been increasing, and "their decline in net railway operating income from all services . . . reflects the fact that their average annual passenger deficit" had become higher (R. 1026).[43]

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[42] This statement of the Commission makes it plain that its "freight carriers" theory was applied to Mountain-Pacific and Midwestern railroads, and was not confined to comparisons with the Eastern railroads (as suggested in C&NW Brief, pp. 62-63).

[43] These statements led to the following Commission conclusion (R. 1033):

> "The railroads in all sections of the country are faced with the continuing necessity of raising funds for additions and betterments and new equipment, and we cannot recognize any difference in the degree of this urgency among the territorial groups."

In its supplemental report, the Commission reiterated its determination to treat revenue needs issues in the framework of "freight earnings." It adhered to its decision to refuse recognition to the "revenue need problem" of the Mountain-Pacific railroads on the ground that their passenger deficits were "responsible" for that need (R. 1072). The Commission thus again made it abundantly clear that it did not base its conclusions on "net railway operating income from all services," but regarded passenger deficits as "important in connection with the claimed revenue needs of the transcontinental defendants discussed in our original report" (R. 1075).

Nowhere in its lengthy discussions of revenue needs did the Commission give any indication of its reasons, if any, for assigning controlling significance to passenger deficits. It did not find that the Mountain-Pacific railroads were in a position to absorb them and nonetheless meet their revenue needs. It did not find that the Mountain-Pacific railroads ought to be penalized for operating passenger trains which serve the traveling public. In light of the evidence of record, neither finding would have been possible.

Nor did the Commission find that by reducing their passenger deficits the Mountain-Pacific railroads could improve their net earnings and thereby secure needed funds. The Government's brief in this Court highlights the absence of such a finding when it states (U.S. Brief, p. 16, note 16):

> "In order to obtain an accurate picture of earning power trend among the respective groups, therefore, the Commission gave some consideration to the fact that differences in passenger operating ratios, *presumably not permanent in nature,* had an effect on the income figures for the period considered in comparing the groups" (emphasis supplied).[44]

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[44] Passenger operating ratios are ratios of passenger revenue to passenger expenses and are thus simply another way of stating the

The Government's presumption is not a finding by the Commission. Nor is there any support for it in the record. In the proceedings before the Commission, appellees offered to prove the contrary, but the Commission refused even to receive evidence on the subject.

The use of passenger deficits and the "freight carrier" concept originated with the Commission's Examiners. There was no evidence in the hearings to suggest that the Mountain-Pacific lines' passenger deficits were "not permanent in nature." Nor did any party urge that any carrier's actual earnings should be disregarded because of passenger deficits.[45] Yet the Examiners' recommended report attributed the revenue needs problem of the Mountain-Pacific railroads to passenger deficits and for the first time injected into the case the "freight carrier" concept of revenue needs (R. 728-729, 736-747).

The Mountain-Pacific railroads filed exceptions to the "freight carrier" concept as unlawful and unsupported by adequate findings. They denied the Examiners' charge that their passenger deficits were excessive, and offered to prove that reduction of those deficits was not a potential source of additional funds. The facts which they offered to prove included the following:

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so-called passenger deficits. The passenger deficit is the difference between the same passenger revenues and the same passenger expenses (including taxes and equipment rentals).

[45] No data at all showing passenger deficits were in the record until the closing rebuttal hearing. At that hearing, a witness for the Midwestern railroads was defending the efficiency of the Chicago & North Western Railway and, far from charging any excessive passenger deficits on the part of the Mountain-Pacific railroads, used the passenger statistics only to support a claim that the North Western's passenger operating ratios were no worse (and no better) than those of the other railroads in the West (R. 124, 620-630).

(1) That the only feasible way of reducing the Mountain-Pacific railroads' passenger deficits would be the discontinuance of substantial numbers of passenger trains, and that passenger trains cannot be discontinued without regard to the public need with respect to individual trains (R. 832-833).

(2) That a reduction of the passenger deficit would not necessarily produce actual dollar savings because the passenger deficit includes a statistical apportionment of common expenses which would have to be borne by freight service even if all passenger service were discontinued (R. 833-838).[46] Even where passenger trains produce revenues sufficient to cover the additional costs needed to operate those trains, and discontinuing such trains would not increase net earnings, the allocation of common costs to such passenger trains nonetheless produces substantial statistical passenger deficits (R. 835-837).[47]

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[46] "Ties deteriorate and must be replaced, bridges must be painted, and many of the other expenses statistically assigned to passenger service must be incurred in any event as part of the freight service" (R. 834).

Cf. *King* v. *United States*, 344 U.S. 254, 265 (1952), where this Court stated:

> ". . . the discontinuance of railroad passenger service would not permit the discontinuance of high-speed tracks and equipment because of the need for fast freight schedules to transport perishable fruits and vegetables from Florida."

[47] Indeed, the Mountain-Pacific railroads offered to prove that, notwithstanding a statistical passenger deficit of $159 million, the passenger trains which they operated produced a contribution to earnings of $26 million in excess of the avoidable costs actually considered by the Commission in train discontinuance cases (R. 836). As the Commission itself stated in *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 427 (1959), the statistically apportioned passenger expenses reflected in the passenger deficits:

> ". . . do not reflect, nor are they intended to provide, the cost of operating individual trains; they are not intended to deter-

(3) That there was no greater future potential for actual savings in the passenger operations of the Mountain-Pacific railroads than there was for the Eastern and Midwestern railroads (R. 828-832).

Appellees' request for hearing (R. 825) was ignored by the Commission. In their petition for reconsideration, appellees again challenged the denial of "any hearing on the 'passenger deficit'—'freight earnings' concept" as a denial of their rights under the Interstate Commerce Act and the Due Process Clause (R. 900). The Commission again made no reference to the question of whether a hearing was required, but merely restated its decision to rely on passenger deficits in discounting appellees' evidence of revenue needs (R. 1075).

Section 15(6) authorizes the Commission to prescribe divisions only "after full hearing." The Commission unlawfully denied appellees the hearing to which they were entitled. Here as in *ICC* v. *New York, New Haven & H. R. Co.*, 372 U.S. 744 (1963), the Commission relied upon considerations (national defense in the *New Haven* case, passenger deficits in the instant case) not urged by any party and not supported by evidence of record. The Court held in *New Haven* that a hearing was required, at which "all parties should have an opportunity to adduce relevant evidence" (372 U.S. at 763-764). This principle is even more clearly applicable here, for not only is the record wholly devoid of evidence showing that appellees' revenue needs can be met through a reduction in their passenger deficits, and not only have appellees been denied an opportunity to prove that this is not so, but no party to this

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mine the expenses which would be avoided if all passenger services were discontinued; and they are not intended to measure the elusive 'out of pocket' costs."

proceeding has even suggested that it can or will adduce evidence to support the Commission's action.

There is no evidence, in the record or outside of it, to support the view that, to use the Government's words here, the Mountain-Pacific railroads' passenger deficits are "presumably not permanent in nature" (U.S. Brief, p. 16, note 10). In these circumstances, the Commission's action in discounting the revenue needs of the Mountain-Pacific railroads because of their statistical passenger deficits is irrational and arbitrary, and itself requires that the Commission's orders be set aside.[48]

The Midwestern appellants' basic position with respect to passenger deficits, as with respect to the other errors of the Commission in dealing with revenue needs, is that the Commission's determination to increase the divisions of the Midwestern railroads was "on the basis of the Commission's findings on relative cost of service and not on the basis of relative general revenue needs" (C&NW Brief, p. 64). On this premise the Midwestern appellants claim that appellees' position is "simply an attack on the Commission for having refused to give the passenger deficits of the Mountain-Pacific lines controlling importance in fixing divisions of joint rates" (C&NW Brief, p. 64). The facts are just the reverse. The Commission did not base its order exclusively on costs (as shown at pp. 22-26, *supra*). And

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[48] The Commission has long followed a policy of treating passenger deficits as a part of the revenue needs of the railroads on the theory that "passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs" (see discussion in *King* v. *United States*, 344 U.S. 254, 260-263 (1952); see also *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 300, 307 (1958)). Even if the Commission has power to change that policy, it must explain its reasons for doing so in order to satisfy Section 8(b) of the Administrative Procedure Act. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-653 (1954). No such explanation is to be found in its reports here.

appellees were not responsible for injecting passenger deficits into this case. The Commission's Examiners did that after the record was closed.

Appellants' principal attempt actually to defend the Commission's treatment of passenger deficits is based not on the ground that the passenger deficit theory is supported by evidence or rational findings,[49] but on the ground that the Commission also considered rates of return from all services (C&NW Brief, pp. 61-62):

> "The Commission did not disregard passenger deficits or rely *exclusively* upon data that excluded those deficits. In appraising the relative general revenue needs of the groups of carriers involved, extended consideration was given to rates of return from all services." (Emphasis supplied.)

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[49] In the only sentence in either of appellants' brief which even attempts to defend the Commission's passenger deficit theory as having a rational basis, the Midwest appellants state that, because the controversy involves the divisions of revenues from freight rates, "it was proper for the Commission to consider the relative positions of the railroads involved as freight carriers" (C&NW Brief, p. 63). Even if true, this would not authorize the Commission to place substantial reliance upon a passenger deficit theory as to which no evidence was taken and no findings made explaining how statistical passenger deficits (as contrasted with actual out-of-pocket losses of operating passenger trains) would affect the revenue needs of the carriers in their operations as freight carriers (*supra, pp.* 70-72).

Moreover, appellants confuse the two separate concepts of cost of service (relating to transcontinental traffic) and revenue needs (relating to the entire transportation operations of the railroads). Section 15(6) refers to "property held for and used in the service of transportation" and this Court has held that language to include "all carrier property." *Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 360 (1936). In considering revenue needs, there is no rational basis for taking account of non-transcontinental freight traffic, but not of passenger traffic which uses the same tracks.

The Midwestern appellants thus argue that, however irrational the Commission's reliance upon its passenger deficit theory might be, that action can be ignored because of the Commission's recital of overall rates of return. Such a position is demonstrably unsound. Substantial reliance upon an unlawful ground of decision was obviously prejudicial to appellees, and appellants concede that the Commission did place substantial reliance upon its passenger deficit theory (U.S. Brief, pp. 46-47; C&NW Brief, p. 64, note 56).

The question therefore is not, as the Midwestern appellants put it, whether the Commission has properly "declined to give controlling weight to passenger deficits in determining revenue needs" (C&NW Brief, p. 65).[50] The Mountain-Pacific railroads never claimed that their revenue needs were caused by passenger deficits. The problem here is that the Mountain-Pacific railroads proved an actual need for revenues to meet the service requirements of the growing Mountain-Pacific territory, and that the Commission gave controlling weight to unreal passenger deficit statistics in discounting and rejecting that showing of actual revenue needs. The Commission's reliance upon the passenger deficit theory was, as shown above, unsupported by any rational findings or substantial evidence and denied appellees any hearing on the subject. For these reasons, the Commission's orders were unlawful and were properly set aside on this independent ground.

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[50] The "line of divisions cases" which appellants cite does not support even this irrelevant proposition. In each of the cases cited, the Commission based its conclusions with respect to revenue needs on the total operations of the railroad, both freight and passenger. The cited references to passenger deficits related to the separate subject of cost of freight service. The only case that related the exclusion of passenger deficits to revenue needs was *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Co.*, 194 I.C.C. 729, 755 (1933). On

IV. THE COMMISSION ALSO ERRED IN ITS TREATMENT OF INDIVIDUAL CARRIERS.

In addition to holding that the Commission's treatment of revenue needs was not supported by necessary findings with respect to the railroad groups, the district court also held that the Commission erred in its treatment of individual carriers (R. 1725-1732).

Section 15(6) by its terms requires that the determination of divisions be made upon consideration of the situations of individual carriers. It provides that the Commission shall determine divisions "as between the carriers party thereto," and prescribe divisions "to be received by the several carriers," after considering the circumstances of "one carrier" relative to "another carrier" (49 U.S.C. § 15(6)).

In divisions proceedings involving many carriers, the Commission may determine and prescribe divisions on the basis of evidence relating to groups of carriers. But the whole premise of this practice of considering divisions on a group basis is that the Commission acts on the basis of evidence which is *typical* of the situations of the individual carriers embraced in each group. Thus, the find-

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reconsideration in that same case, the Commission stated that such a computation was not necessary to its decision and did not express "a principle of general application." 198 I.C.C. 375, 383 (1934). On appeal, this Court understood that the Commission had dealt with revenue needs on all transportation property. *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 360 (1936).

All of the decisions cited by the Midwestern appellants (C&NW Brief, p. 65) are analyzed in detail in Plaintiffs' Brief (App. B) and Reply Brief (App. C) in the district court. These briefs included in the record filed in this Court.

In contrast to its action in this case, in *Official-Southern Divisions*, 325 I.C.C. 1, 49, 77-78 (1965), the Commission recognized the interrelationship of freight and passenger service and included passenger deficits in determining costs of service as well as in considering revenue needs.

ings made by the Commission on a group basis may be treated as applicable to each carrier in that group upon, but only upon, a determination by the Commission that the group evidence *is typical* of individual carriers.

This principle was first stated in the *New England Divisions Case,* 261 U.S. 184, 196-197 (1923), where the Court said:

> "It is asserted that the order is necessarily based upon the theory that, under § 15(6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void. Whether Congress did confer that authority we have no occasion to consider; for it is clear that the Commission did not base its order upon any such theory. The order directs a 15 percent increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence which the Commission assumed was typical in character and ample in quantity *to justify the finding made in respect to each division of each rate of every carrier.*" (Emphasis supplied.)

The Government says the *New England Divisions Case* held that new divisions may be based upon " 'evidence which the Commission assumed was typical in character, and ample in quantity' to justify the divisions of rates involved" (U.S. Brief, p. 30), thus implying that there is no requirement of law that the Commission consider the situation of individual carriers in prescribing divisions. By paraphrasing, rather than quoting, what the Court actually said in *New England Divisions*, the Government substantially distorts that holding. What the Court held in *New England Divisions* was that group findings must be based upon evidence "typical in character and ample in quantity to justify the finding made in respect to each division of each rate of every carrier" (261 U.S. at 197).

If there was ever any doubt as to the meaning of *New England Divisions,* it was removed in *United States* v. *Abilene & Southern Ry. Co.,* 265 U.S. 274 (1924), in which the Court made it plain that the Commission has no authority to prescribe divisions without considering the situations of individual carriers. Speaking through Mr. Justice Brandeis, who also wrote for the Court in *New England Divisions,* the Court stated the rule which has applied ever since (265 U.S. at 291):

> "The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of traffic on joint rates appears to be unjust."

In arguing that the district court erred in holding that the Commission must consider the situations of individual carriers, appellants ignore the *Abilene & Southern* case.[51]

Appellants also distort the opinion of the district court in an effort to make it appear that the lower court required more of the Commission than do this Court's decisions in *New England Divisions* and *Abilene & Southern.* Thus, the Government suggests that compliance with the district court's ruling would require the Commission to make a separate investigation and separate findings with respect

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[51] The cases following the *Abilene & Southern* case and applying the rule announced therein are discussed in detail in *Atchison, T. & S. F. Ry. Co.* v. *United States,* 225 F.Supp. 584, 591, 594-597 (D. Colo. 1964), where the court correctly concluded that the *Abilene & Southern* rule "has not been overruled, *sub silentio* or otherwise" (225 F. Supp. at 597).

to each of more than 300 railroads under each of the standards of Section 15(6) (U.S. Brief, pp. 26-27, 30). Appellants also seek to make it appear that the lower court held that the Commission lacks statutory power to prescribe divisions on a group basis (U.S. Brief, pp. 28-29; C&NW Brief, pp. 78-81). The district court held neither of these things. Nothing in its opinion departs from the holding of *New England Divisions* that findings as to a group of railroads apply to each carrier in the group so long as such findings are based upon evidence typical of individual carriers. And the district court certainly did not hold that the Commission could not make such findings. On the contrary, the court below specifically adopted the opinion in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 225 F. Supp. 584, 595 (D. Colo. 1964), which expressly upholds the power of the Commission to prescribe divisions on a group basis so long as it makes certain that the order which prescribes divisions on a group basis also produces fair divisions for individual carriers (R. 1728):

> "Before it relies on average or aggregate data, the Commission must make sure that the divisions formula under consideration (although seemingly just and equitable when viewed in terms of its impact on a group of railroads as a group) has not been constructed in such a way that its impact on any particular division of any particular rate as applied to any particular carrier is unjust."

Thus, the district court simply held that in order to prescribe divisions on a group basis, the Commission must find that the prescribed divisions are fair to individual carriers.

Findings with respect to the impact of the prescribed divisions upon individual carriers are especially important in this case because the Commission's orders here produce changes in divisions which vary widely over different routes

(as shown in Appendices A and B hereto). This order is to be contrasted with the Commission's order in *New England Divisions* in which all divisions were changed by a uniform 15 percent (261 U.S. at 187).

Because of the nature of the divisional scales which constitute the ultimate orders of the Commission, and the way in which those scales would apply, the Commission's orders would have their most severe and disproportionate impact upon one Mountain-Pacific railroad, the Denver & Rio Grande Western.[52] Because the prescribed divisional structure would for the first time split one of two competitive routes, the Rio Grande would be caught in a unique competitive squeeze that would deprive it of substantially all of its net income (R. 906-913).[53]

In these circumstances, the shortcomings of the Commission's findings with respect to individual carriers are clear under the controlling decisions of this Court in *New England Divisions* and *Abilene & Southern*. The Commission has not made any findings that the prescribed divisions would be fair "in respect to each division of each rate of every carrier" on the basis of typical evidence (261 U.S. at 197). Moreover, it was affirmatively shown that the effect of the prescribed divisions upon the Rio Grande railroad was substantially unlike their effect upon the group of which it was a member. The Commission's plain duty was: (1)

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[52] The orders also would have an impact upon the Frisco and Katy railroads quite different from their effect upon the other members of the Midwestern group. This aspect of the individual carrier problem is being dealt with in a separate brief filed by those appellees.

[53] This issue has nothing to do with "subdivisions" not prescribed by the Commission, as appellants erroneously contend (U.S. Brief, p. 43; C&NW Brief, p. 85). As held by the district court "the needs of individual carriers" require consideration "in determining the primary divisions" (R. 1731).

to make findings, on a group basis or otherwise, that the prescribed divisions are fair to the carriers whose situations were typified by that of the whole group; and (2) to give consideration to the situation of a carrier affected disproportionately by the prescribed divisions and either modify its orders to avoid such a result or make findings justifying such disproportionate treatment. Because the Commission did none of these things, the district court was clearly correct in holding that the Commission had failed in its duty to determine the fairness of the prescribed divisions to individual carriers.

The Government's assertions that the holding below imposes "a virtually impossible requirement," and would "seriously impair the Commission's ability to administer" Section 15(6) (U.S. Brief, pp. 27, 29) are without substance. The Commission need only comply with the *New England Divisions* and *Abilene & Southern* cases, by making findings based on adequate and typical evidence that the divisions which it prescribed are fair "in respect to each division of each rate of every carrier" (261 U.S. at 197). And to give consideration to railroads claiming that they were disproportionately affected certainly would impose no oppressive burden where, in this case involving 300 carriers, only 3 railroads claimed that they were affected disproportionately.

Appellants attempt to justify the Commission's failure to consider the situation of the Rio Grande by contending that that carrier waived its right to individual consideration by joining in the Mountain-Pacific group and failing to ask for individual treatment (U.S. Brief, p. 42; C&NW Brief, pp. 83-84). This was not the case. The problem is not that the Commission failed to give the Rio Grande *better* treatment than the other members of the Mountain-Pacific group. The Commission's orders would have an impact upon

the Rio Grande far *worse* than they would have upon any other member of its group. Plainly, the Rio Grande did not, by joining the Mountain-Pacific group, waive its right to object to divisions which would single it out of that group and impose losses upon it entirely disproportionate to those imposed upon other members of the group.[54] The question of the effect of the Commission's orders upon the Rio Grande was raised at the earliest possible moment following the action of the Commission that would inflict those disproportionate losses.[55] The district court was correct in

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[54] The Government's argument that individual carriers "having voluntarily aligned themselves into groups" should be "bound by the findings grounded on a consideration of evidence introduced on a group basis" (U.S. Brief, p. 42, note 27) makes sense only where the carriers within the group are accorded relatively equal treatment. Joining a group does not bind a carrier to accept losses disproportionate to those incurred by other members of the same group.

[55] The divisional scales prescribed by the Commission had not been proposed by any party and had not been recommended by the Examiners. Thus, a petition for reconsideration of the Commission's initial report was the Rio Grande's first opportunity to complain of the special injury which the Commission's order would inflict upon that railroad (R. 906-913). *United States* v. *Tucker Truck Lines*, 344 U.S. 33 (1952), relied upon by appellants (U.S. Brief, p. 43; C&NW Brief, p. 85), has no application where, as here, a carrier presented its claim to the Commission at the earliest opportunity and that claim was ruled upon by the Commission.

The Government suggests that a carrier must make a special individual case at the outset of the hearings to warrant any special consideration (U.S. Brief, pp. 33, 37). As a practical matter, any such requirement would force every carrier to present separate evidence at the hearings to guard against the possibility that some feature of the Commission's subsequent order might have a special impact upon that carrier. The rule sought by the Government would produce the very proliferation of evidence as to each and every carrier which the Government claims would impede the administration of the Act.

rejecting the contention of waiver, holding that "there has been no intentional relinquishment of a known right" (R. 1732).

There is no substance to the Midwestern appellants' claim that a waiver resulted from the Mountain-Pacific railroads' request that the Commission restrict itself to issues raised in the pleadings (C&NW Brief, pp. 84-85). Opposition to Commission decision of issues not raised in the pleadings cannot conceivably be held to constitute a waiver of the Rio Grande's right to fair treatment within the scope of the issues which were raised.[56]

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[56] Contrary to Midwestern appellants' assertion (C&NW Brief, p. 85), the Rio Grande's loss is not conjectural, nor would it depend upon subsequent subdivisional agreements. The Rio Grande, jointly with Midwestern railroads between Colorado junctions and the Missouri River, provides a route competitive with the single-line Union Pacific route between Utah and the Missouri River. The Union Pacific's single line between the same points is not affected by changes in divisions as between Midwestern railroads and the Rio Grande. The Western Pacific and the Southern Pacific interchange traffic with both the Rio Grande and the Union Pacific at Utah points, and their divisions with the Union Pacific with respect to revenues for service west of the Missouri River are also unaffected by the Commission's orders. As a result, the Rio Grande must absorb the entire shrink from changes in divisions west of the Missouri River (R. 909). Even if the Western Pacific and Southern Pacific were willing to absorb part of the loss by giving the Rio Grande higher subdivisions, as the Midwestern lines conjecture (C&NW Brief, p. 85), such action would be self-defeating because the traffic would then tend to be diverted away from the Rio Grande to the Union Pacific routes (for the reasons explained in U.S. Brief, p. 39, note 23; see also R. 909).

The claim that the Commission left the matter "precisely where the transcontinental defendants insisted that it be left" (C&NW Brief, p. 85) is false. The statement of the Mountain-Pacific railroads cited by the Commission (R. 1080-1081) related to the very different circumstances of the Examiners' report which recommended negotiations to determine specific divisions *before* any

Appellants seek to blur the distinction between the right of carriers to *consideration* of their individual situations and the question of whether an individual carrier is entitled to *special treatment* (U.S. Brief, p. 41, note 27). By construing the district court's decision that the Commission must *consider* the situations of individual carriers as though it were a holding that the Commission must give special treatment to any carrier which demands it, the Government is able to conjure up a whole series of possible difficulties (U.S. Brief, pp. 38, 41). This argument misses the point. Of course, the Commission has power to refuse any carrier special treatment, or even the uniform treatment with other members of its group which was sought here, if the circumstances warrant such action, and if the Commission makes the necessary findings on the issues presented to it. But the Commission cannot simply refuse to *consider* the situation of individual carriers.

The Government impliedly recognizes this in its discussion of the Commission's recent decision in *Official-Southern Divisions*, 325 I.C.C. 1, 38-46 (1965); 325 I.C.C. 449, 450 (1965), in which it points out that the Norfolk Southern Railroad "demonstrated to the Commission's satisfaction

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change in the existing structure was to be made (R. 752-753, 755). And the Mountain-Pacific railroads, of course, resisted prescription of subdivisions as between Mountain-Pacific railroads over Utah junctions where such subdivisions were admittedly not at issue under the pleadings (R. 913). But that could not justify inflicting disproportionate injury upon the Rio Grande. What it does mean is that the Commission should at least have considered the merits of giving separate treatment to the divisions as between the Rio Grande and its connecting Midwestern railroads on routes between Utah and the Missouri River. A separate basis applies to these divisions today and a continuation of the present divisional structure is what the Rio Grande and all the Mountain-Pacific railroads proposed throughout the proceeding (R. 257).

that its circumstances and conditions were sufficiently unlike those of the other Southern carriers as to merit individual treatment" (U.S. Brief, p. 33). The Government never suggests that the Commission could have refused even to *consider* the situation of the Norfolk Southern. The Government tacitly admits the Commission had a duty to consider the Norfolk Southern's situation and decide whether, taking into account both the needs of that carrier and the desirability of uniform divisions for all carriers similarly situated, a case had been made out for *special treatment.*

The Rio Grande is every bit as much a "part of the Nation's transportation system" as the Norfolk Southern (compare U.S. Brief, p. 34, note 19). The Rio Grande has a right to *consideration* of its individual situation, and the Commission should have taken that carrier's situation into account before it prescribed the divisions here at issue.[57] Had it done so, it might well have decided that the desirability of the divisional mechanism which it chose was outweighed by the fact that such a mechanism would virtually destroy an important railroad. The district court did not hold that the Commission was bound to reach this conclusion as a matter of law, but it did correctly hold that the Commission had the duty to *consider* and make findings on this issue.

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[57] It is no answer to suggest that the Rio Grande can remedy any injustice by requesting separate consideration (U.S. Brief, p. 38). The Rio Grande made such a request at its first opportunity, immediately following entry of the order that would cause the injustice, and the Commission did not suggest that the Rio Grande should have made any further request. If the Government expects the Rio Grande to apply for relief after the Commission order becomes effective, how is that railroad expected to survive in the interim without net income? In *Official-Southern Divisions,* the Commission dealt with the individual situation of the Norfolk Southern *before* making effective a general divisions order that would have ruined that railroad.

V. THE COMMISSION'S COST DETERMINATIONS RAISE SUBSTANTIAL LEGAL QUESTIONS WHICH WERE NOT PASSED UPON BY THE DISTRICT COURT AND WHICH ARE NOT BEFORE THIS COURT.

In the reports under review, the Commission discussed "cost of service" (R. 991 *et seq.*) and set forth a "restatement" of cost evidence (R. 1009, 1107). As we have shown, the Commission decided that the divisions prescribed in its orders would not be based on costs, but "must reflect certain broader aspects of revenue need" (pp. 22-26, *supra*). Nonetheless, "consideration of the cost evidence" figured to an unstated extent in the Commission's conclusion that the existing divisions were unduly favorable to the Mountain-Pacific railroads (R. 1032).

In the district court, appellees sought judicial review of the Commission's determinations with respect to costs. Ten separate issues of law were presented (numbered 20 through 29), each of which challenged the Commission's cost determinations on a separate ground (R. 1325, 1338-1345). However, because the Commission's reports made it plain that costs were not the basis of its orders prescribing increased Eastern and Midwestern divisions, and all parties so construed those reports, the district court stated that "in view of the conclusions reached [with respect to the Commission's erroneous treatment of revenue needs] it is unnecessary to discuss issues 20 to 30" (R. 1733).

As a result, the issues of law raised in challenging the Commission's cost determinations are not before the Court in view of the "practice of this Court not to review an administrative record in the first instance . . ." *United States* v. *Great Northern R. Co.*, 343 U.S. 562, 578 (1952).

Accord: Seaboard Air Line R. Co. v. *United States*, 382 U.S. 154, 157 (1965).[58]

The Midwestern appellants recognize the practice of this Court and state: "Appellees are entitled to invoke this practice" (C&NW Brief, p. 50, note 39). These appellants state that their appeal is "properly confined" to "questions actually decided by the District Court" (*ibid.*). Thus the question before this Court is whether, assuming *arguendo* that such determinations as the Commission made with respect to costs are correct, the Commission's orders are valid. As shown in the foregoing sections of this brief, the Commission's orders were not based upon costs and were not lawfully supported, so that the court below correctly set aside the Commission's orders without reaching any issues directed to costs. On the other hand, if appellants were to prevail in this appeal, the proper disposition would be for this Court to remand the case to the district court to provide judicial review of the Commission's cost determinations.

The Government, however, contrary to the practice of this Court and to its own position in similar cases, urges that it would be "neither necessary nor expedient to remand the case to [the district] court for further consideration with respect to any issues not specifically considered in its opinion" (U.S. Brief, p. 62).[59] The stated basis for this

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[58] See also *FPC* v. *United Gas Pipe Line Co.*, — U.S. — (35 Law Week 4239, 4242, decided March 13, 1967), remanding the case to the Court of Appeals instead of upholding the administrative order because there was a further issue "to which the Court of Appeals has not addressed itself, and we think it appropriate for the issue to be raised there."

[59] Compare the Government's Memorandum in *Seaboard Air Line R. Co.* v. *United States*, Nos. 425 and 555, October Term 1965, pp. 4-5:

suggestion is the Government's view that "it would be appropriate . . . for this Court to proceed to resolve the entire controversy once and for all . . ." (*ibid.*). Apparently, however, what the Government suggests is not that the Court *resolve* the cost issues reserved by the district court, but that it simply *ignore* these issues and uphold the Commission's orders whether or not legal errors were committed which vitiate the Commission's cost determinations. The Government does not discuss or even mention a single one of these cost issues, nor did it bother to have printed any part of the record dealing with those issues so that the Court might actually accord judicial review with respect to such issues.

The net effect of the Government's position is to argue, for the first time in this Court, that the Commission's orders are based exclusively on costs (an erroneous argument as discussed at pp. 22-26, *supra*), and then to suggest that appellees be effectively denied their right to judicial review of the very cost determinations now claimed to be the sole basis of the Commission's orders.

In the absence of a printed record covering the subject, and in view of the practice of this Court not to review such issues in the first instance, it would not be appropriate to brief these issues at this time. It is appropriate, however,

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"The Department of Justice urged below that, tested by proper criteria, the Commission's findings in this case were *not* adequate, and we would renew that contention on a remand. But the question of the adequacy of the Commission's findings, in our view, is not ripe for decision by this Court at this time. The task of reviewing an administrative order and its underlying findings is primarily that of the three-judge district court, not this Court, whose practice is 'not to review an administrative record in the first instance' (*United States* v. *Great Northern R. Co.*, 343 U.S. 562, 578)."

to dispel the impression conveyed by the Government's brief that the reserved issues are not substantial.[60]

The underlying problem is that, for important elements of cost, the Commission's "restatement" uses the *average* costs of *all* traffic handled by the respective groups of railroads, as contrasted with the costs of handling the transcontinental traffic at issue. The Commission's report concedes that the "principle, which is correct," is to determine the costs of handling the transcontinental traffic at issue (R. 1010). But the Commission's "restatement" of costs nevertheless uses average costs in many important respects, an approach which grossly overstates the costs of the Midwestern railroads, particularly in their capacity as intermediate (bridge) carriers of transcontinental traffic.

The operation of appellant Chicago & North Western Railway is illustrative. C&NW operates over 9,000 miles of railroad in 9 states, including extensive branch lines and light density main lines which are high-cost facilities (per unit of traffic) because of low utilization. C&NW's average costs, by definition, include the costs of all of these operations. But practically all of the C&NW's transcontinental traffic is carried over high density lines between Chicago and the Missouri River gateways.[61] A carload of transcontinental traffic from New York to San Francisco simply does not move over C&NW branch lines or the many

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[60] In the court below, the Government as well as the Midwestern railroads conceded that at least three of the cost issues raised substantial legal questions. The pre-trial stipulation provided that, if the Commission were held to have erred with respect to Issues 21, 23 or 27, such errors were "prejudicial" and were not "*de minimis*" (Issue 30, R. 1345).

[61] 98 percent of C&NW's transcontinental bridge traffic and 93 percent of C&NW's total transcontinental traffic move over these high density lines (Tr. 6845).

C&NW light density main lines that are not part of any transcontinental routes.

The Commission, however, used in its "restatement" of costs the average costs of maintaining all C&NW lines, including those over which the transcontinental bridge traffic never moves. The Commission found, correctly, that the level of "maintenance of way and structures"[62] costs (per unit of traffic) is strongly influenced by relative density (units of traffic per year per mile of track). But because the *average* main line in Mountain-Pacific territory had a density of 8,474,000 tons per mile, whereas the *average* main line in the Midwest had a density of only 4,804,000, the Commission concluded that the higher maintenance costs in Mountain-Pacific territory caused by the heavy grades and sharp curvature of lines in the mountains were more than offset by the much lower density of the average main lines in the Midwest. On this basis, the Commission justified its use of average costs (R. 1062). This was patently arbitrary and without support in substantial evidence.

In the first place, the Commission's finding with respect to light density on Midwestern *main* lines, even if otherwise sound, does not justify imputing any part of the costs of maintaining the Midwestern *branch* lines to transcontinental bridge traffic. The fact that main lines "are used by bridge traffic" in the Midwest (R. 1062) is the very reason that branch line costs should be excluded from consideration here, not a reason for including them. Yet in determining the costs of transcontinental freight traffic moving over main lines in the Midwest, the Commission used territorial average unit costs which are inflated by the inclusion of

[62] The costs related to "way and structures" include generally the expenses of maintaining and owning the tracks, bridges, tunnels, signals and other structures along the railroads' right-of-way.

the high unit costs of branch lines. Arbitrary treatment of railroad density figures has previously been condemned by this Court in setting aside a Commission order. *Public Service Commission of Utah* v. *United States*, 356 U.S. 421, 426-427 (1958).

In addition, the Commission's use of *average* main line density figures is not supported by substantial evidence. With respect to the C&NW, the average density of main lines reflects light density "main lines" to such dead-end points as Rapid City, South Dakota, and Lander, Wyoming. The record shows that the lines which actually carry transcontinental traffic over the C&NW, namely the lines between Chicago and the Missouri River, have a density of 10,045,000 tons per mile.[63] This is more than double the average main line density for Midwestern railroads relied upon by the Commission and is substantially higher than the average density of main lines in Mountain-Pacific territory (R. 1062). The Commission's "restatement" of costs which reflects the costs of the even lower average density of all Midwestern lines, main and branch, grossly overstates the costs actually incurred by Midwestern railroads on the lines over which transcontinental traffic actually moves. Thus, the Commission's action was arbitrary and without support in substantial evidence, in violation of Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706).

This illustration with respect to maintenance costs (Issue No. 25) relates to but one of the issues not reached by the district court (R. 1338-1345). As to many of the cost elements, an overriding error was the Commission's rejection of the evidence showing the costs of handling transcontinental traffic where the Mountain-Pacific railroads had made actual studies but it was found that "comparable" data were not presented for the other railroads. The Com-

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[63] See Exhibit MW-123 (App.), Tr. 1680; Exhibit T-145, Tr. 2461.

mission conceded that the Mountain-Pacific railroads "were unable to make studies for the other territories comparable in scope to the one in mountain-Pacific territory because the data were not available to them" (R. 998). But the Commission failed to require the other railroads to come forward with their own data with respect to the costs of handling transcontinental traffic and thus the Midwestern railroads were permitted to hide behind their average costs of all traffic.

This was a plain violation of law. As this Court recognized in its recent opinion in *ICC* v. *New York, New Haven & H. R. Co.*, 372 U.S. 744 (1963), when a material cost issue is raised in an adversary proceeding between two or more carriers, each carrier has the burden of coming forward with evidence of its costs (372 U.S. at 760, note 12):

> "Of course, when such an issue is raised, each carrier should bring forward the data relating to its own costs that are required for resolution of the issue."

The same principle was stated and applied with respect to the very point here at issue in *Boston and Maine Railroad* v. *United States*, 208 F. Supp. 661, 676 (1962), *aff'd* 371 U.S. 26 (1962).

Here, the Commission not only failed to require the Eastern and Midwestern railroads to come forward with data in their possession, but it also failed in its own responsibility to assure that the record before it was adequate. This failure stemmed from the Commission's doubt that it had power to require railroads to produce data showing their costs (R. 1059). This was clearly wrong, considering the express provision of Section 20(1) of the Interstate Commerce Act empowering the Commission to require carriers to make "special reports" and to furnish responses "to all questions upon which the Commission may deem information to be necessary" (49 U.S.C. § 20(1)).

The Commission's casual approach to these legal principles undoubtedly developed because the Commission did not intend to make a definitive determination of costs in any event, in view of its decision not to base its order upon costs (R. 1032, 1078, discussed at pp. 6-7, 9, 23-24, *supra*). But if appellants were correct in their argument that the Commission did base its order on costs, the Commission's determination of those costs would, of course, have to satisfy applicable legal requirements.

Since a full briefing of the legal errors of the Commission's cost determination is inappropriate under the usual practice of this Court "not to review an administrative record in the first instance" (p. 87, *supra*), we have undertaken only to show that the issues presented are substantial and may not be brushed aside as suggested by the Government.

The Government's suggestion is apparently based upon the mistaken notion that the district court has already expressed its views on the cost issues (U.S. Brief, pp. 61-62). That notion is based largely upon statements from the district court's opinion taken out of context and not directed to the cost issues at all. And it is directly contrary, not only to the lower court's explicit reservation of decision with respect to the cost issues (R. 1733), but also to the square holding of that court that administrative cost determinations must be reviewed under the Administrative Procedure Act (R. 1719-1720, 1721-1722):

> ". . . Plaintiffs object to the Commission's method of determining costs because it failed to use certain adjustments suggested by plaintiffs in the Rail Form A formula used. The Commission used average costs of all freight traffic, not the costs of transcontinental freight here in issue. This, plaintiffs urge, is in violation of the Acts involved because the Commission failed to require Eastern and Midwestern lines to produce data in their

sole possession showing their actual costs, and the Commission therefore failed to make required findings and conclusions, with respect thereto, supported by substantial evidence."

* * *

"*Mississippi River Fuel Corp.* vs. *F.P.C.*, 163 F.2d 433 (D.C. Court of Appeals, 1947), was a rate case before the Federal Power Commission on a petition to review and set aside its order.[64] The court . . . observes [163 F.2d at 439]:

> 'The Congressional provisions extend to complicated, difficult matters as well as to simple questions. The courts cannot evade their responsibility merely because the subject matter is obscure. And neither can they be required to probe the minds of the agency for unfound facts or unexpressed reasons. The coordination of the two functions of administrative discretion and judicial review requires that the facts upon which the discretion is exercised, and the reasons, be clearly and completely stated. When the matter is complicated, the necessity is greater.'

"There is no question but that whether the new divisions are just, reasonable and equitable is for the Commission, not for the Court. But it is equally clear that, in prescribing the divisions, the minimum duty of the Commission is to give due consideration to each of the five factors the Congress has listed in Section 15(6). Furthermore, although the Commission has broad discretion in the matters involved, such discretion can never serve as a substitute for the 'findings and conclusions, as well as the reasons or basis therefor', required by Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 1007(b)], or for the clarity of findings required by that Act."

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[64] In the *Mississippi River Fuel* case, the court reviewed and set aside an administrative determination with respect to "ascertainment of costs" (163 F.2d at 439, 449).

Thus, contrary to the Government's suggestion, the district court has expressed its willingness to review the cost issues in the first instance if that should prove necessary. The district court did not reach the cost issues, not because of any view that they lacked merit, but solely because the Commission's action was not based on costs and was found to be unlawful without reaching the cost issues.

Accordingly, there is no basis for the suggestion, made by the Government alone and for the first time in its brief, that this Court should summarily brush aside appellees' right to judicial review of the Commission's determination of costs in the event the Government and Midwestern railroad appellants were to prevail on the other issues in the case.[65]

VI. THE CONTENTION OF THE MIDWESTERN RAILROADS THAT THE DISTRICT COURT SHOULD HAVE SPECULATED WITH RESPECT TO FUTURE EQUITY JURISDICTION WAS PROPERLY REJECTED.

The Midwestern appellants, in an argument the Government does not join, contend that the district court "erred in declining to retain jurisdiction to require equitable resettlement of the divisions involved on the basis of any valid order prescribing lawful divisions that the Commission might [after a remand] make in the reopened proceeding" (C&NW Brief, p. 42). Recognizing that the Commission has no authority to require retroactive adjustment of the divisions of joint rates (C&NW Brief, p. 107), the Midwestern appellants maintain that the district court should have held that "Mountain-Pacific lines had been receiv-

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[65] If this Court should decide to depart from its usual practice, and accord appellees their right of judicial review with respect to the Commission's cost determinations in this Court in the first

ing excessive divisions," that they therefore owed "a debt in some amount" to Midwestern lines, that after remand, the Commission would "make any additional findings that might be required" and reaffirm its "original determination," and that the court should retain jurisdiction so as eventually "to require such resettlements of revenues as might be just and equitable" (C&NW Brief, p. 111).

Midwestern appellants' concern with "resettlements of revenues" was wholly premature in the district court, and it is equally so in this Court. Each link in the chain of circumstances which, they assert, might eventually require equitable relief is entirely speculative.

Certainly, it is not true that there have been Commission findings, not invalidated on judicial review, "that the present divisions are unjust, unreasonable and inequitable to the Midwestern lines" (C&NW Brief, p. 42). The Commission has no authority under Section 15(6) to make such findings except as part of the process of fixing new divisions, and the factors to which "the Commission shall give due consideration" apply to the whole matter of "so prescribing and determining the divisions" (49 U.S.C. § 15(6)). The reports of the Commission show that it did not determine the lawfulness of existing divisions separately from prescription of new divisions (R. 1068). Nor did the district court so fragment the case.[66] The errors of

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instance, it is respectfully requested that the Court order that the printed record be supplemented; that supplemental briefs be filed, and that the case be set for further argument to provide for a meaningful judicial review of these issues.

[66] The Midwestern appellants expressly requested that the district court limit its judgment to setting aside the Commission orders "insofar as they prescribe new divisions" (R. 1735, 1736). Appellees showed in the district court that the judgment was properly directed to the entire action of the Commission with respect to the present divisions as well as the prescription of new divisions (R. 1747-1751). The district court's judgment set aside the orders

the Commission for which the court below set aside its orders infect the Commission's decision with respect to the lawfulness of the present divisions as well as its prescription of new divisions. And to the extent there are Commission cost determinations not found to be in error (C&NW Brief, p. 105), it is because the district court did not reach the cost issues (*supra*, p. 87).

It was not for the district court (or this Court) to determine that "the Mountain-Pacific lines had been receiving excessive divisions" (C&NW Brief, p. 111); the question is obviously one for the Commission to determine on remand. It is true that the Commission has full authority "to make adequate findings on remand that would support an order prescribing lawful divisions" (C&NW Brief, p. 106), but there is no basis for the speculation of the Midwestern appellants that, on remand, the Commission would "enter an order reaffirming its original determination" (C&NW Brief, p. 111).

If speculation were in order, it is far more reasonable to assume that, on remand, the Commission would *not* enter an order reaffirming the orders now under review. The Commission having found in a subsequent case that the very divisional scale prescribed herein "unlawfully depresses the revenues of the long-haul carriers" (as discussed at pp. 44-45, *supra*), it is most unlikely that the Commission would reenter the same order on remand of the present case. Nor is there any basis for speculating that any new order on remand would increase the present divisions of appellant Midwestern railroads. There is no basis in the recent decisions of the Commission for believing that the revenue needs of the Mountain-Pacific railroads would again be discounted

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of the Commission in their entirety (R. 1756), thus rejecting the contention of the Midwestern railroads, repeated in this Court (C&NW Brief, p. 105), that the district court's opinion dealt only with the prescription of new divisions.

because of the statistical passenger deficits relied upon here (*supra*, pp. 76-77, note 50). And even speculating that a new order would be based solely on costs and not at all upon revenue needs, it is reasonable to assume that a determination of the costs of handling transcontinental traffic, as contrasted with the average costs of all traffic (as discussed at pp. 90-93, *supra*), would require a *reduction* in the present divisions of the Midwestern railroads.[67] In short, the Midwestern appellants' arguments respecting equitable restitution and the "debt" they claim will be owed them are purely speculative.[68]

The district court properly declined to speculate upon questions of equitable jurisdiction and remedies in the event of a further order of the Commission on remand (R.

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[67] This is especially true with respect to the Midwestern railroads' service as intermediate (bridge) carriers of Official-transcontinental traffic. Even using average costs which grossly overstate the costs of providing service over the Midwestern railroads' high-density bridge routes (pp. 90-92, *supra*), the Commission's "restatement" indicated that the Midwestern railroads' present revenues would be increased by only 0.3 percentage point on the basis of costs (R. 1011, as discussed at p. 32, *supra*).

[68] Nor is there any basis to the claim of the Midwestern appellants that the length of these proceedings provides some equity for their position (C&NW Brief, pp. 6, 78, 108), since the Midwestern railroads themselves contributed to the long duration of, and irrational orders entered in, these proceedings.

The Midwestern railroads filed a "me-too" complaint two months after the Eastern railroads had initiated the proceedings (I.C.C. Docket 31503, Sub. No. 1) (R. 1), and two years elapsed before the Midwestern railroads were able to complete their direct evidence. The Mountain-Pacific railroads completed their direct evidence seven months later. The Midwestern and Eastern railroads thereupon obtained a delay of a year and one-half to rebut the Mountain-Pacific railroads' cost study. The record was thereafter closed, the Examiners' report issued, and exceptions taken before the Commission. The Commission then had the case under advisement for two years. Judicial review in the district court required only ten

1734). The district court's action was in full conformity with the decisions of this Court. The impropriety of premature court action with respect to questions of equitable jurisdiction and remedies was emphasized by this Court in *Lehigh Valley Cooperative* v. *United States,* 370 U.S. 76 (1962). Refusing to engage in speculation as to possible consequences of any new order of the Secretary of Agriculture replacing the order that was being set aside, the Court stated (370 U.S. at 99):

> "The Secretary of course remains free [to enter a new regulation] in any manner consistent with the provisions of the statute. . . . We do not now decide whether or not any new regulation directed to that end could be made to apply retrospectively, or whether, if it could be validly so applied, the presently impounded funds could be resorted to *pro tanto* in its effectuation. Cf. *United States* v. *Morgan,* 307 U.S. 183. 'What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such pro-

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months from the service of the Commission's supplemental report through briefing, argument and decision.

This time-table shows that the long duration of these proceedings was in no respect the fault of the Mountain-Pacific railroads. Nor were they in any way responsible for the irrational nature of the Commission's decision. The Mountain-Pacific railroads have urged throughout the proceedings that the divisions should be based upon a rational standard, namely that they be based upon the costs of handling transcontinental traffic with specific adjustment to reflect documented revenue needs. It was the Midwestern railroads who resisted, successfully, the request of the Mountain-Pacific railroads that the divisions be "constructed or justified by cost" (R. 1078-1079; see pp. 47-48, *supra*).

Having themselves delayed these proceedings, and having themselves requested a Commission order unsupported by costs or any other rational standard, there is no equity in the Midwestern railroads' claim in this Court that they have been long deprived of divisions based on costs.

ceedings, are not matters which we should attempt to forecast or hypothetically to decide.' *Morgan* v. *United States*, 304 U.S. 1, 23, 26."[69]

None of the cases relied upon by Midwestern appellants requires or even suggests that any decision with respect to equitable jurisdiction or remedies should be made prematurely, on the basis of speculation about what an administrative agency might do. *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301 (1935), does not support Midwestern appellants' efforts to have this Court decide such questions on the basis of speculation about what an administrative agency might do on remand. In that case, the Court made its ruling *after* "the Commission had cured the defects in the form of its earlier decision" (295 U.S. at 311), and had "prescribed the same rate that it had put into effect before" by means of a new order sustained on appeal by this Court (295 U.S. at 307). *Addison* v. *Holly Hill Fruit Products Inc.*, 322 U.S. 607 (1944), also relied upon by Midwestern appellants, was not a case of equitable restitution in connection with administrative orders. It was a suit between private parties for wage payments in which this Court directed the district court to hold the case while the Administrator of the Wage and Hour Division defined the coverage of the controlling statute.

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[69] At a later stage of the *Morgan* litigation, the Court held that the district court should not act to distribute a fund when such judicial action would be "at the risk of obstructing reparations" (307 U.S. 183, 197). The *Morgan* case turned on "the meaning and application of the provisions of the Packers and Stockyards Act" (307 U.S. at 188), under which retroactive relief in the form of reparations was expressly made available (307 U.S. at 189, 193, 197). No such reparations power exists with respect to divisions under the Interstate Commerce Act (as Midwestern appellants concede, C&NW Brief, p. 107). The situation with respect to divisions is necessarily different because of the continuing right of a carrier to decide whether to concur in, or to remain a party to,

Furthermore, the dominant theme of the cases relied upon by the Midwestern appellants is that the courts should so exercise their jurisdiction as to avoid unseemly clashes between the courts and administrative agencies. *Morgan,* 307 U.S. at 191, 194; *Holly Hill,* 322 U.S. at 620-621. No such problem is presented here. Neither the Commission nor the United States contended in the court below or contends in this Court that the district court erred in refusing to retain jurisdiction at the request of the Midwestern railroads. And there is no basis for claiming that there is any public interest in favor of sustaining the divisions which were prescribed by the Commission in this case.[70]

Thus, none of the cases relied upon by Midwestern appellants is apposite. The district court properly followed the controlling authority of the *Lehigh Valley* case, *supra,* in refusing to speculate on the hypothetical future equities asserted by the Midwestern railroads.

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joint rail rates. As stated in *Brimstone R. Co.* v. *United States,* 276 U.S. 104, 121-122 (1928):

> "Obviously a carrier may have assented to a through rate only because of the divisions accorded to it: to permit the Commission to change this arrangement as to past transactions would be exceedingly harsh if not wholly unreasonable."

[70] The Commission has promptly vacated its orders upon request of the railroads and, indeed, has implored the railroads to settle these disputes by fixing their own divisions. In its 79th Annual Report to Congress (1965), the Commission stated (p. 18):

> "When the rail carriers are unable to agree on fair divisions they 'resort to the umpire' by instituting proceedings before the Commission. The proceedings are bitterly contested and present some of our most complex problems. . . . . Determined and more conciliatory exploration of possible solutions by the carriers themselves would relieve the Commission of much of the burden of these cases."

This same plea was repeated in the Commission's 80th Annual Report to Congress (1966), p. 18, released after the vacation of its orders to make effective the settlements in this case.

CONCLUSION

For the reasons stated in this brief, the judgment of the district court, setting aside the Commission orders under review and remanding the case to the Commission, is correct and should be affirmed.[71]

Respectfully submitted,

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[71] Should the Court hold that the Commission's orders were correctly set aside, but for reasons different from those stated in the opinion of the district court, the judgment below should be affirmed with modification to provide that the remand to the Commission shall be for further proceedings consistent with the opinion of this Court. See *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U. S. 300, 312 (1958).